STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE COUNTY SUPERIOR COURT

CRAIG DUNN and PHILIP WILEY, et al.,
Plaintiffs,
-v-
RJR NABISCO HOLDINGS CORPORATIONS, et al.,
Defendants.

CAUSE NO. 18D01-9305-CT-06

VOLUME 6
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P.M. Session.

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(Out of presence of jury.)
MR. CASSELL: All rise.
THE COURT: Thank you, be seated.

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Good morning, Counsel.

ALL: Good morning.

THE COURT: Plaintiff appears in person by Counsel. All defendants represented this morning?

MR. OHLEMEYER: Correct.

THE COURT: In terms of argument this morning, my plan is to deal with the motion to permit further discovery. Secondly we'll deal with motions to quash the modified subpoena. Thirdly, motion to exclude prejudicial material from cross-examination. Fourth we'll deal with the issues revolving around the Osdene deposition.

And I'm not sure we need to deal with the deposition -- the Colby deposition this morning, but we'll try to deal with those four matters before we bring the jury in.

Plaintiff filed their motion for leave from discovery deadline February 13th. The Court's last reviewed that. Defense filed a

response to that motion. Plaintiff have anything in addition to what's contained in the motion?

MR. WESTBROOK: Your Honor, Ed Westbrook. We don't at this time.

THE COURT: Defendants wish to be heard on the matter?

MR. OHLEMEYER: Your Honor, I think the only other thing I need to bring to the Court's attention, and you may be aware of this, the law firm of Chadbourne & Parke has filed a motion that is related to this.

THE COURT: I saw that.

MR. OHLEMEYER: That I don't think you need to deal with on the motion to open discovery, but you'll have to deal with at the point if and when you get past this and we talk about the subpoena itself.

THE COURT: Plaintiffs have requested leave to conduct further discovery regarding Minnesota sanction documents Court's reviewed their motion, Court has reviewed defendants' response thereto. Court finds the motion of the plaintiffs will be sustained. I'll issue an order to

that effect, Counsel.

Defendants have filed a motion to quash a modified subpoena. As you know, we discussed this matter Friday afternoon. The subpoena was to be modified. The gist of the defendants' motion seems to be that even the modified version is too broad.

Mr. Ohlemeyer.

MR. OHLEMEYER: Your Honor. In light of the generous amount of time that this Court has permitted for discovery in this case, and in light of the fact that you've allowed them to supposedly narrow the subpoena, the fact that they have now come

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in and asked for more than what they told you they wanted on Friday is some indication of why and how this has nothing to do with this lawsuit. This subpoena as currently drafted will involve the Court in a protracted discussion of privilege. It will require the Court to hear from non-parties to the case. It will require the Court to essentially conduct a document-by-document review of anything that might be appropriately discoverable under the

subpoena. And quite frankly, it has nothing to do with this lawsuit.

If the plaintiffs' subpoena is allowed to stand, then the defendants to this case will respond with an appropriate privilege log. There are non-parties to the case who want to be heard on the issue, and we will embark upon a procedure whereby we will do everything except finish the trial of this case over the next three weeks. These are all issues that are collateral to this case. These are documents upon which claims of privilege have been and appropriately asserted, and the subpoena that has been put before Your Honor is substantially broader than what the plaintiffs asked you for on Friday. And for those reasons, Your Honor, I think, and for the reasons set forth in the brief, I think it ought to be quashed.

In addition to that, I don't represent Chadbourne & Parke. They have Counsel here. I assume they want to be heard on that. And I would ask the Court, if you're inclined to hear from them, John Wilkes from the firm of Blackburn & Green from Fort Wayne is here on

their behalf. And as you know, they have filed a brief on that.

THE COURT: Thank you, Counselor. Mr. Wilkes here?

MR. WILKES: Yes, Your Honor.

THE COURT: Mr. Wilkes, do you care to be heard on this issue?

MR. WILKES: For the record, Your Honor, my name is John Wilkes from the firm of Blackburn & Green in Fort Wayne. I have only entered my appearance in order to file a motion to admit Mr. William Snipes of the firm Sullivan & Cromwell from New York City, who would like to be admitted for the purpose of making argument on this issue.

THE COURT: All right, Counselor. Is he here?

MR. WILKES: He is.

THE COURT: Good morning, Counselor.

MR. SNIPES: Good morning, Judge.

THE COURT: Let me make sure that I saw the motion for your admission here. Mr. Wilkes has moved the admission of Mr. Snipes of Sullivan & Cromwell for

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purposes of this case. The Court will sustain that motion. You are William Snipes?

MR. SNIPES: Yes, Judge.

THE COURT: You're from Sullivan & Cromwell of in New York?

MR. SNIPES: That's correct.

THE COURT: And you represent Chadbourne & Parke, Counselor?

MR. SNIPES: Yes, I do, Judge.

THE COURT: Be glad to hear any comment you might like to make.

MR. SNIPES: Thank you, Judge. I know you have a trial going and I'll try to be as brief as possible. I am here for one reason, and one reason only. And that is because the breadth of the subpoena served by Mr. Motley and his team of lawyers purports to reach not simply out of the state of Indiana, but out of the state of Indiana to New York, and out of New York by extension to the United Kingdom.

Now, I say that because the subpoena by its terms demands that Chadbourne & Parke produce documents that is in its possession

belonging to a Chadbourne client that's in the United Kingdom and that's Gallahers. I think you've heard something about Gallahers on Friday. I read the transcript.

I'll just tell you this by way of background, Judge. Two things. Two things. I want you to understand who Gallahers is and who Chadbourne is. I want you to understand that there is something else in play here. There is a proceeding pending today in New York. It's scheduled to be argued on the 4th of March. It involves a lot of papers. Here is what we put in, including what the other side put in.

If you're going to get to this, Judge, I have to give you these papers because these papers brief very important issues of law concerning the Haj1hate convention. I've got to talk a little about that. The hate convention comes into play because Gallahers is a United Kingdom company. They're over in the U.K.. They're not in the U. S. They're a cigarette manufacturer for sure. They've never sold a single cigarette in the United States. They've got

no marketing or advertising, nothing here. Their only connection to the United States is Chadbourne & Parke. Chadbourne represents them and has so for a number of years, but it represents them in connection with litigation that's pending in the United Kingdom.

The relevancy of that, Judge, is that what the subpoena purports to do is to reach across the pond over into the United Kingdom

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and effectively make Gallahers produce documents in this proceeding.

I say that -- I say there is a proceeding in New York. We've made a motion in connection with that proceeding to quash a subpoena that purports to do the same thing. There are a lot of reasons it's inappropriate, and I think they all lead back to the same conclusion. You can't do that because the Court lacks jurisdiction over that non-party.

Now, in this case it's even further removed. Mr. Sheffler shows up, Mr. Sheffler is a partner to Chadbourne & Parke. He represents one of the defendants.

He comes to court -- well, whether he comes to court or not, he comes to this state to help in the representation of his client. He's at a restaurant, a plaintiff lawyer walks over and hands him a subpoena. Sure. Mr. Sheffler is here and for some purposes the Court has jurisdiction over him. And I'll tell you, Judge, just so that you know, the jurisdiction you have over Mr. Sheffler is jurisdiction you do not have over me.

And that is, if I do something, if I flip out here, you surely have the authority to hold me in contempt. What my presence here doesn't do, what Mr. Sheffler's presence here couldn't do is give this Court, this State, jurisdiction over Chadbourne such that it can compel Chadbourne to produce documents in connection with this action.

Now, you know, if there is a legitimate discovery that needs to be in this case, there are ways to do that. If there is legitimate discovery from Gallahers that needs to be in this case, there is a treaty. It's called the Hague convention. And what

you do is, you come to Your Honor and you say Judge, we need discovery of Gallahers, they've got relevant documents. I've got a commission here. Give me, Judge, authority to go into the United Kingdom and get those documents and you go to the United Kingdom and the Courts there will hear you or they won't.

What you can't do, and I hope in my brief, Judge, that you find it compelling, because, frankly, I do. There's a long line of constitutional cases which says you can't do that. It's extraterritorial. You have the jurisdiction and authority over things and persons in your presence.

And I say this, Judge, and I don't want to get too excited about it. The subpoena is flawed from start to finish, and there are -- you know, it is so bad, the Courts have crafted a number of documents to try to deal with it. But the basic principle is

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this: We cite a case that says to enforce a subpoena duces tecum you've got to have jurisdiction. Well, how do you get jurisdiction over the person that you're

trying to compel to produce the documents? You get the jurisdiction by virtue of that law firm being in state. Well, that's easy. Or that law firm doing business in the state and your long arm statute reaches them. It's just pure, simple constitutional analysis. Well, some courts have said we want to up you on that.

There are two other documents on that. Fiduciary shield and immunity. And what they try to do is protect the proceeding. So then I'm not here. That's what they try and do.

It's when a lawyer comes into the state to represent -- in his representative capacity, the lawyer is not subject to jurisdiction. He's coming there on behalf of his clients and they call that fiduciary shield. And there are lots of cases that have applied that to all kind of people, including lawyers.

There's a document called the immunity document which essentially says the same thing. When a witness or lawyer comes into court, they are free -- that comes into your

state, they are free from service.

Now, it makes sense, Judge, because if Mr. Motley shows up this morning and I hand him a subpoena, and then you've got to deal with that subpoena, and someone of the other defendants' lawyers hands him a subpoena, you've got to deal with that subpoena, for documents, for that lawyer's testimony, it's disruptive of the process, putting aside the fact that it is totally unfair.

Now, so I'm suggesting to you, Judge, that because the subpoena is defective, we can stop, full stop right here. If you want to go further, then we've got to talk about the Hague convention, because I think this is a serious front to the Hague convention, and we've got to talk about fundamental claims of attorney-client privilege.

To know that a privilege is involved, all you have to do is look at the subpoena. The subpoena says Chadbourne produced documents in your possession concerning your client.

Now, I'm not going to tell you that every piece of paper at Chadbourne & Parke

is privileged. But I am going to tell you that the documents that this subpoena reaches concerning Gallahers -- and I'm not addressing the other parts of it, the other companies listed in the subpoenas, as I understand it, are defendants here. They've

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got lawyers, and they'll address that.
The impropriety here is attempting to subpoena documents belonging to a non-party, that is not in the state, not in the country. And that's the problem. And that's why we need protection.
Now, if you're forcing me to, Judge, I'll make a motion to supplement the record, because if you're going to get beyond this jurisdictional defect and address the privilege claims, then you need the submission that we made in New York. And I'm telling you you don't have to do that, because we've put these cases in -- we've put this material before a New York judge because another party is seeking to get access to Gallahers' documents from the U.K. That's going to be argued very soon, and it's going to be decided and it will be

resolved. And if that subpoena is valid and the documents are produced, then there is nothing to talk about.
But if you're going to address that, I need to supplement the record and demonstrate, as I believe these papers do, why those documents, putting aside whether or not the subpoena is defective, why those documents are privileged.
Now, I don't want to take up all your time and go on and on and on about why they're privileged, but they're privileged because they were created by the client for the lawyer to help with litigation.
So I'm sure on this table here they've got some documents just like that. Their client may have helped them put together some documents to help the lawyer prepare for the case. That's a no brainer. You can't get those.
The others are documents that preexist. You know, let's say these companies have 100,000 documents, I don't know, but you take two or three documents and you give it to your lawyer and your lawyer does an

analysis. Now, that document is not privileged, but if you go in the lawyer's files and get it, you're communicating what the lawyer was doing. Go to the -- and that's why the rules, virtually every rule tells you you've got to go to the client and you've got to go there in the right way.
I've taken up too much of your time, Judge.
THE COURT: Counsel, we may get back on the other issue, but I wanted to hear your thoughts initially. Thank you.
MR. WILKES: Should I submit the New York submission?
THE COURT: Let me hear the initial comments from the plaintiffs and then let's see where we are.

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MR. WILKES: Okay. Thank you, Judge.

THE COURT: Thank you, Counselor.

MR. WESTBROOK: Your Honor, Ms. Ritter from our office will address this.

THE COURT: All right.

MS. RITTER: Good morning, Your Honor.

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THE COURT: Good morning.

MS. RITTER: First of all, much of that argument was a rehash of either what was argued by Mr. Ohlemeyer last week or by what was argued by the various parents in their attempts to get out of this case. And so I'm not going to go back into all of those details. Many of the arguments that he's made are, though, essentially the same arguments that the holding companies have made.

The reason we're here where we are, as we indicated last week, and in our submission to the Court, is that we requested documents from the defendants in this case, American and Brown & Williamson, and their parent, from American and from Brown & Williamson, American's successor, and from the companies' parents, and we did not receive the documents that we are now attempting to get.

We subsequently on the -- after this trial was already going on, learned of the existence of very germane and telling documents that bear directly on the issues

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in this case. And we are faced with a situation where this defendant has directly avoided discovery that would have been relevant to the case.

Obviously, if we had known about the documents, we could have listed the documents and we wouldn't be here. The whole point is that we didn't know about the documents because of all of their attempts to hide the documents either through their law firms or in foreign countries.

I only had a brief opportunity as he was speaking to read his papers, having not received a copy of it over the weekend, and was taken by the fact that there was no explanation herein of the relationship between Gallahers and American. There is a relationship. The relationship between Gallahers and American is similar to another successor holding company situation where American Brands owned American Tobacco and additionally owned Gallahers.

Chadbourne & Parke, as we explained last week, and was set forth in the Minnesota order that's been attached to our

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papers, also represented each of these companies in tobacco litigation.

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We don't know what's in all of the documents. We do know what's in a couple of the documents that have been required to be produced in the state of Minnesota case.

There are two groups of documents that we're here about. One group is the group that is already here in the United States up in Minnesota subject to that court's jurisdiction in Minnesota.

THE COURT: Which is what Mr. Motley asked permission to do Friday.

MS. RITTER: That's right.

THE COURT: Now, do you have a copy of your attachment to the subpoena?

MS. RITTER: I do. And while the words make it sound like it's quite broad, what we are trying to get is those documents which the Court has required them to turn over. When the defendant made their argument on Friday, they then indicated that they are still preserving their objections to those documents, and that they have done so in numerous court papers.

So what we've attempted here to do is to, in addition to the documents that we are requesting, if they intend to withhold documents, claiming privilege and claiming that it's still subject to this court case up the New York, we want to get the pleadings and the materials that they have filed in that case so that we can more quickly get to this Court's attention, to Your Honor's attention what the remaining dispute would be.

For example, a good bit of what we've asked here, No. 4, is probably in the brown folder that Mr. Snipes was talking about. We've asked for the affidavits that they submitted in connection with those document disputes up in the case of Minnesota case. I imagine that's what's in the folders. That would be No. 4 and No. 5.

Because we don't know what the documents are, I have to confess there was some difficulty in trying to decide what to way in this attachment. We thought they understood from the Court's - from the record that was made what we're wanting to

get are those documents that the court in Minnesota has, after several weeks now of dispute, should have been produced, are available and under the control of this defendant and are, in fact, in the process of being produced in Minnesota. And that's what we want to get those documents.

Mr. Sheffler is a partner in that law firm, there is a reference in their papers to some fact witness recognizing Mr. Sheffler. That's absolutely incorrect. Several of us know Mr. Sheffler, have been at various depositions of him.

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It was a coincidence that we got the leaked document from Minnesota that bears directly on this case. It is a confession that Gallahers, the relative of American Tobacco, and now Brown & Williamson, admitted in 1970 that smoking causes cancer in humans. Having seen that document and knowing that Chadbourne & Parke was in the middle of this who could have the documents and were the plaintiffs in Minnesota going to get the documents, we wanted to try and get to the crux of the matter and thought

that having a Chadbourne & Parke person available to provide insight into things such as the Brown folder might be helpful in us trying to get these delinquent and withheld, apparently, relevant documents.

And we apologize if this still seems overbroad, but it's those things that the Court is making them turn over, part of which has already turned -- they've turned over, that we want. And to the extent that they are going to withhold from even this Court those materials, and we are in the position of having to try to further litigate this here, we would have liked to have been able to see the papers that have been filed by the parties in the New York proceeding, including affidavits, so that we could expedite our preparation for dealing with that issue here in this court.

On the subject of whether attorneys can be subpoenaed and can be fact witnesses, we do think that Mr. Sheffler, as a member of the law firm of Chadbourne & Parke, was uniquely possessed with information that would have otherwise been unavailable and

believe that Indiana law did support the subpoena as the Court found last week.

That's all I would add at this point, Your Honor. We did honestly just see their brief. So if there is any reason to, we could address some of the issues and try to fill in some of the gaps of the relationship between Gallahers and American.

American is in this case. American Brand was in this case. Brown & Williamson is in this case. And BAT is in this case. And Gallahers is not a stranger to those companies. Gallahers was owned by American Brand, Gallahers participated in many of the industry-wide organizations that have been put in issue and are participants in the conspiracy that the plaintiffs will prove exist in this case. And to act as if they are some foreign innocent company that just happened to coincidentally be represented by Chadbourne & Parke is really not very accurate, and we could provide additional information if the Court requires. Thank you.

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THE COURT: Thank you, Counselor.

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Mr. Ohlemeyer.

MR. OHLEMEYER: Very briefly in response, Your Honor, and again, we're hearing some very serious charges that no one has put before you any evidence to support. As the Court remembers, discovery against BAT was stayed in this case pending resolution of the jurisdictional issues. You resolved the jurisdictional issues, no one asked to conduct any further discovery against BAT. There has been the suggestion that this information that they're trying to obtain right now was requested in this case but not produced.

Your Honor, I really think that's quite a gross misstatement, if not an absolute untruth. No one has put a discovery request before Your Honor that says we, the plaintiffs, ask for information which would encompass these documents.

It is undisputed that American Tobacco Company produced 65 boxes of documents and a privilege log that sat in Mr. Shockley's office unopened despite the fact that plaintiffs' Counsel were notified of the

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fact that those documents were available for inspection. It is undisputed that the Ness Motley law firm asked for these specific documents, and they did it very specifically, as early as January 21st, in a case in Oklahoma in which they're involved. It is undisputed that they asked for the same 1100 documents on January 22, in a letter the Ness Motley firm wrote to Counsel for Brown & Williamson.

So, Your Honor, all of this is to say that this subpoena is not a proper discovery effort in this case. What the plaintiffs' lawyers are trying to do here is to get you to decide something on short notice and without development of an accurate record that is being litigated in other cases in which they are involved in other states, and I don't think the Court should allow this kind of subpoena to be issued and to be served and to be enforced in an effort to circumvent the process and procedure of other courts and to involve this court in a procedure that is not what the law of Indiana would require the Court to do if

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they had served a request, we had responded with a privilege log, and then the Court was required to debate the issue of privilege on a document-by-document basis.

So for those reasons, Your Honor, I think the subpoena could be quashed and should be quashed.

MS. RITTER: Your Honor, if I might just add one thing briefly on this

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connection of what we did request?
THE COURT: Go ahead.
MS. RITTER: We provided to the Court the specific requests where we were asking the defendants, and all their predecessors, sisters and children to produce documents relevant to the issues of smoking and health, product testing, safer cigarettes. We attached those requests. From what we saw in the document leaked that week, that document clearly seemed to be pertinent. We certainly had no way of knowing that 1100 documents that we thought we were after have now turned out to be these same documents. I'm not sure that that will even turn out to be correct. But

since we don't know what they are, we certainly at this point have no way of knowing.

And as for these 65 boxes, they are correct that 65 boxes were produced by American Tobacco three weeks before the close of discovery in this case. And based on their own feelings in the state of Minnesota, the documents that we are talking about now are not in those 65 boxes or on the privilege logs that would have been provided with those boxes. And their filings in the state of Minnesota that the defendants have indicated that, in fact, those documents, these Gallahers documents, the Gallahers set, has not ever been produced up to the point of this dispute in Minnesota and has not been included on privilege logs. So to keep throwing up these 65 boxes is somewhat of a red herring. And it doesn't really get to the point of these documents. We could have looked through them, we could have spent three weeks looking through 65 boxes and we still wouldn't have had these documents and we

still wouldn't have known of the significance of the discovery in the Minnesota case if the Court up there hadn't come upon through the mechanism of 100,000, $200,000 fines for the withholding of this material. And that's what we're now at this point trying to get at.

Thank you, Your Honor.

THE COURT: Thank you. Mr. Snipes.

MR. SNIPES: Judge, the only thing that Chadbourne is in the middle of is a discovery dispute between the plaintiff and the defendant. And my only point, Judge, is the plaintiffs can't obtain discovery from the defendants by getting it from one of their law firms.

Now, unless the allegation -- and there are lots of allegations. There were allegations made this morning and there are allegations made in the transcript for which

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I've seen -- I've seen affidavits from people who know that disproves that. Unless, Judge, someone is saying that B&W doesn't have the documents that the plaintiff wants and that Chadbourne doesn't,

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they're not saying that. They're saying Mr. Sheffler was just conveniently available so we served the subpoena on him because we know that his law firm represents the parties and he might have the documents.

Well, that's beside the point. The subpoena ought to have been served on the parties and the difference between Chadbourne and Gallahers and the parties in this litigation is precisely that. They're not parties. And the way to obtain discovery from a non-party is not by serving a subpoena on that non-party's lawyer.

Now, what they're getting you into, Judge, is to authorize an illegal subpoena. The subpoena is invalid, and that is hardly an open case.

Now, I hate to say this, but I represent a law firm, and one of my -- one of my law firm -- my client is a lawyer in this case, but I don't really care about that. I don't care about what discovery goes on between the parties.

What I'm telling you, Judge, is that you can't take discovery from Chadbourne &

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Parke this way because it's illegal, and that's the simple fact, and you can't get discovery from Gallahers this way because they're not here and there is a way to do that. And all I'm saying is you've opened discovery for these guys; if they really need discovery from Gallahers, I suppose there is a way to do that. But what they're asking you to do with this is not what they told you they would do on Friday. That is clear. Just look at -- I read the transcript. I wasn't here. In fact, Judge, I learned about this at 4:00 on Friday, and I spent the weekend preparing these papers to come and to tell you, Judge, what I'm telling you, and that is that the subpoena is unlawful.

And the other stuff they're talking about, frankly, I don't care whether it's right or wrong. I'm just telling Your Honor that it's not right. It's inappropriate to drag the law firm into this. You know, I don't want to lecture about it, but that's my point.

What I heard, and I don't know the

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parties so I don't know the lady's name, I heard her say there is some history about the Chadbourne documents. Judge, this file here are papers that were filed in court. All you do to get these is you go to the

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Clerk of Courts and you say I want to see the papers that were submitted. There is no secrets in here. Nothing in here is under file. I'm not hiding anything. She said what's in Mr. Snipes' folders. Here it is. Here it is. There. I gave it to them. I'm going to file a copy with the Court.

Judge, what I'm saying is those are documents which I think, the Court pleadings, which I think demonstrate that you cannot take discovery from a non-party through its lawyers and a document demonstrating an affidavit from a British barrister. Remember I told you, Gallahers is over in the U.S. It does business in the U.K. It happens to have a U.S. lawyer. Well, that's no surprise. It's no surprise that Gallahers would turn to Chadbourne because Chadbourne has represented some of these defendants.

But the litigation that they're representing Gallahers in is in the U.K., so it's no surprise, this British barrister would tell you, Judge, under United Kingdom law which, after all, this is sort of where much of our common law derived from, under U.K. law, that the U.K. client is entitled to a privilege. And we've told the judge in New York that.

But since I've given the stuff to the plaintiffs because they seem so desperate to say that Chadbourne is in a conspiracy, and Mr. Snipes has got the documents in his pocket, and the defendants are always in that position. The defendants say, Judge, these documents are privileged, we can't give them to them. Well, the plaintiffs say, Judge, those are documents of a conspiracy. And their mere fact in not giving them to you, Judge, proves that there is something in them. Well, they've got them. Now I'm going to give you a copy, Judge, and all I'm going to say is you've got to quash the subpoena.

MS. RITTER: Your Honor, if I could

just one --

THE COURT: Let him finish, Counselor.

MS. RITTER: I thought he finished.

MR. SNIPES: What this is, Judge, as I've said, is telling you what the documents are. That's the full submission in New York.

THE COURT: Are these copies of the discovery responses made in Minnesota, Counselor?

MR. SNIPES: No, Judge. They're copies of Chadbourne & Parke's motion in New York court to quash a subpoena directing that Chadbourne produce documents in its files concerning its U.K. client.

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THE COURT: All right. I just want to be clear about that.

MR. OHLEMEYER: Your Honor, in response to your question, the 1100 documents we're talking about were on a privilege log that was submitted to court and Counsel in Minnesota that the Ness Motley firm had in their possession before the start of this trial. Some of the

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documents on that privilege log, not all of them, some of them are actually on the privilege log that was made available in this case but not reviewed.

THE COURT: If you have those in Minnesota, why do I need to order those again, Counsel?

MS. RITTER: Your Honor, I don't need the actual -- what I need is the affidavits that were apparently submitted with some of the responses under seal. There were materials submitted by Brown & Williamson on behalf of, I guess its predecessor, American, under seal. It's those materials that I actually need. They were attached when the Court got it. And when the plaintiff there got it to the responses to the discovery request, we do not have access to that material that was filed under seal. That's what we need. It's affidavits that were submitted.

THE COURT: Isn't that an issue that should be addressed to Minnesota?

MS. RITTER: If it was --

THE COURT: Your firm has the

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documents, or at least they've been filed in a case in which your firm is involved.

MS. RITTER: Your Honor, we are not involved in the case in Minnesota. That's a state case that is going on to trial Ness Motley has never been involved in any representation of the plaintiff in that case. And the only way we get materials in the state of Minnesota case is if, a, the defendants provide us separately what they've provided in Minnesota or if we can get them from the Court's file in Minnesota, and we cannot get the materials that are filed under seal. That's why certain documents had been produced in Minnesota that are part of this dispute that we never could get until the Judge, right before they were used with the witness or an opening statement, lifted the seal.

That's how the one that we used last week, the 1970 documents, became available. So there are still things in Minnesota, unfortunately, under seal and that court, as I understand it, is attempting to address as it can.

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On the question of who is Gallahers.

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In this lawsuit we sued American Tobacco and American Brands. In their own papers, Chadbourne & Parke has indicated that American Brands owned Gallahers. Gallahers was spun off from American Brand in May of 1997. We did request all materials from American Brands, American and Brown & Williamson relating to any of its subsidiaries and related entities throughout the years that are at issue in this case. So to say that somehow Gallahers' stuff has never been involved in this case is incorrect.

It's a misunderstanding, perhaps, and Mr. Snipes has just come into the case, of the facts, that the parents and the holding companies are in this case. And American Brand is and American Brand did own Gallahers.

THE COURT: Do you have a copy of the subpoena?

MS. RITTER: Yes, Your Honor, I do.

THE COURT: Look at paragraph 1. Copies of discovery responses. Now, tell me

what you want Mr. Sheffler to do in response to this subpoena as it relates to paragraph 1.

MS. RITTER: Provide anything that was submitted in the case in Minnesota under seal.

THE COURT: Since the first of the year. That's what Mr. Motley said.

MS. RITTER: Yes, Your Honor.

THE COURT: That would be about 1100 documents.

MS. RITTER: And any written affidavits that they submitted under seal addressing any of the -- I don't know for a fact that the actual 1100 documents have been turned over in Minnesota. But if they have, then yes, the 1100 documents. For any documents that have yet to be turned over in Minnesota that Gallahers may still be holding or Chadbourne & Parke may still be holding, then --

THE COURT: That's not what Mr. Motley asked for. He asked for anything that had actually been filed in Minnesota.

MS. RITTER: In Minnesota, then

yes, Your Honor, simply if the 1100 are all in Minnesota, that's what we want is the 1100 documents.

THE COURT: All right. That was a request made Friday. I've considered the motion to quash over the weekend. I knew there was going to be an argument. The attachment to the subpoena is in six paragraphs, and that is overly broad. There is no question about that, that it requests more than was requested Friday.

The only thing that I think is

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appropriate is paragraph 1, which the Court will strike paragraphs 2 through 6 of the attachment and the subpoena will apply as it relates to those items filed in the state of Minnesota after the first of the year and referred to in paragraph 1.

I'm going to permit those items to be filed under seal. We will deal with any privilege issue at a later point.

MS. RITTER: Thank you, Your Honor.

MR. SNIPES: Your Honor, just to be clear, you're talking about the 1,114 documents; right?

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THE COURT: Yes, sir. That's all I'm talking about at this point, Counselor, and I'm going to permit those to be filed under seal.

MR. OHLEMEYER: Filed? I'm confused, Your Honor. Filed with you or given to the plaintiffs' lawyers?

THE COURT: Actually at this point I will have them filed with the Court in response to the subpoena. Then we'll deal with any privilege issues.

MR. OHLEMEYER: Do you want briefs on the privilege issues in connection with the filing, or do you want --

THE COURT: Mr. Snipes, do you intend to be here if there is an argument, where there is an argument on the privilege issue?

MR. SNIPES: Judge, as to your order, Brown & Williamson, I believe, will address those issues, not Chadbourne, because Chadbourne doesn't really have any interest in that.

THE COURT: I appreciate that. Thank you, Counselor.

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MR. SNIPES: Thank you.

THE COURT: So there is no confusion, Mr. Sheffler will be in compliance if these documents are filed with the Court under seal. Then I'll determine if and when they should be released. That concludes the matter on the motion to quash.

Plaintiffs' filed a motion to exclude prejudicial or relevant testimony regarding expected cross-examination from Mr., is it Wigand?

MS. RITTER: Wigand, Your Honor.

THE COURT: Any comment on that?

Actually this is in the nature of a motion in limine. The defendants are correct. It is past the time for the filing of the motion in limine, but any comment on your motion?

MS. RITTER: Yes, Your Honor. Your Honor, the plaintiff will withdraw its motion which was filed more as an anticipatory objection to what we would believe clearly prejudicial questioning of

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the witness, and would simply request that Your Honor require that if these

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materials -- if this type of questioning is anticipated, that defense Counsel at that point in time, while the witness is on the stand, perhaps, request a brief side bar so that we could remind Your Honor or tell Your Honor at that time of what our concerns are concerning the irrelevance and prejudicial nature of that questioning.

But we are happy to withdraw the motion. It really is simply we are concerned about the possibilities not having been involved with many of these Counsel in the past of a blurt out of something that would be just prejudicial and inappropriate so we'll withdraw the motion.

THE COURT: I haven't noticed anything. All right. Plaintiffs' motion to exclude prejudicial testimony in anticipation of cross-examination is withdrawn.

Plaintiffs on Friday filed a packet regarding the Osdene deposition. I did receive defendants' motion in opposition to that, and essentially asking that that not be admitted into evidence.

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Mr. Ohlemeyer, any comment on your motion?

MR. OHLEMEYER: Very briefly, Your Honor. And --

THE COURT: Let me stop you before you begin. Let's talk, first of all, about what effect the Texas order will have on my decision.

MR. OHLEMEYER: Well, I think, Your Honor, that procedurally if the plaintiffs' lawyers want to use this deposition in this case they need to go to Texas and get an order from that judge unsealing the deposition for use in this case. Why and how the judge makes that decision is not something, obviously, I can predict, but I think it's an issue of procedure that needs to be addressed with Judge Folsom in the first instance.

But more importantly, Your Honor, I think, as you'll recall, by court order we were required to identify deposition transcripts that were to be used in this trial, and the plaintiffs were very broad and very comprehensive in giving us 120 some

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pages of individuals and specific depositions with specific pages and specific lines. This deposition of Dr. Osdene appears nowhere on that pleading that was filed on January 23 with the Court. They identify depositions of Dr. Osdene taken in the Chipallone (phonetic) case when he was an employee of Philip Morris, but nowhere do

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they identify a deposition taken in the state of Texas case which was taken after Dr. Osdene retired from the company.

So procedurally I think this evidence should not be put before the jury, and substantively, Your Honor, I don't want to repeat everything that was described in our motion, because I think it's well written, quite frankly, and comprehensive.

The fact of the matter is there is no probative value that outweighs any prejudicial effect on this type of testimony in this type of case on the issues that are to be decided here and for those reasons, Your Honor, we would ask the Court to grant our motion.

THE COURT: Thank you, Counselor.

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For the plaintiff?

MR. WESTBROOK: Yes, Your Honor, with your permission, Ed Westbrook.

THE COURT: Mr. Westbrook, is he correct this was not included in your designation?

MR. WESTBROOK: Yes, Your Honor, he is correct, in the blizzard of paperwork going back and forth, this deposition, which is no surprise to anyone, was not included. It's been -- since it was taken in May of 1997 last summer, it's been the Osdene deposition. But he is correct that in this 100 something pages those pages got omitted. How it happened, I don't know how it happened, but he is correct that that happened, Your Honor.

But as to the issue of prejudice, Your Honor, I just want to supplement that to say that we did do the 48-hour disclosure pursuant to Your Honor's rule I think on February 9th that it was I wrote to Mr. Ohlemeyer saying we would use our previously designated excerpts from Osdene, Spears and Colby, and on the next day we

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sent over and specifically said plaintiffs intend to use previously disclosed excerpts from the videotape deposition of Dr. Thomas Osdene, taken in the state of Texas vs. the American Tobacco Company.

Frankly, Your Honor, we did not realize until it was raised by the defendants that those pages had been omitted from the very large designation. And it is a 113-page designation of various depositions. But he is correct as to that fact, Your Honor.

THE COURT: Let's talk about the other issue. You have a Texas court, district court in Texas which has ordered this deposition sealed. The point here is that should you not have an order from the Texas court releasing that? Or concealing that?

MR. WESTBROOK: Your Honor, I think

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there are two points that answer that satisfactorily. First, the text -- three points.

First, Judge Folsom's procedure in Texas was when anyone asked, he released it. He released it to Florida, released it to

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Mississippi, released it to Minnesota. So I think we have a course of conduct.

Number two.

THE COURT: Did you ask here?

MR. WESTBROOK: No. Your Honor, the case is over down there.

Number two, Judge Folsom, perhaps, has no jurisdiction on that issue.

But number three, and perhaps dispositive, is that in the agreement winding up the case, the parties agree, the defendants agreed with the State that we were free to seek leave of other courts in other actions to have previously confidential and sealed material released. And I have a copy of those pages from the comprehensive settlement agreement and release which was in the big packet that we supplied, I believe, to the Court, but it may very well have been buried in there.

With your permission, Your Honor, I would hand that up to you. I have another copy for the defendants.

THE COURT: Thank you.

MR. WESTBROOK: Your Honor, I've

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handed you the cover, pages 23 and 24 of the comprehensive agreement and release in the Texas case. And in paragraph 22, which begins on page 23, it's headed "Non-admissibility," and the portion that is of relevance here, Your Honor, is the carryover, in fact, the sentence that begins on page 24 that ends up the paragraph: Thereafter, any party to the action may make any motion with respect to such discovery materials. Then we get to the important part, provided, however, that nothing in this paragraph 22 shall preclude undersigned Counsel from seeking disclosure of such materials in other actions or settling defendants from agreeing otherwise in any other action.

Your Honor, that provision, I think, has a clear purpose. That is Judge Folsom at some point I think, and rightfully so, would want to wash his hands of matters in closed cases. At the same time, the plaintiffs in Texas, and we were Counsel for the plaintiffs, among others, certainly did not want to see information disclosed in

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Texas die in Texas. That would be contrary to the efficiency of the judicial procedures, it would be contrary to getting at the truth, which is what we want to get

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at. So under that provision, clearly, Your Honor, I think we have the right to come to Your Honor and ask that this Osdene deposition, which has been released, was released by Judge Folsom to everyone who asked and also I think we have an order that we provided to the Court with the Minnesota judge just the other week, February 4th. He unsealed the Osdene deposition taken in that case and it's my information that it was read or is perhaps to be read this week in Minnesota.

So very shortly any concerns about embarrassment, et cetera, because of Dr. Osdene taking the Fifth Amendment have been or will be obviated.

So, Your Honor, for that reason I think that it is proper and appropriate for us to come to Your Honor and ask that the Osdene deposition, which I understand may even be on the Internet, could be read in this

court. And Your Honor, I'll address the substance if you want to get to it past the procedures.

THE COURT: No. I'm talking procedure now.

Mr. Ohlemeyer, anything else?

MR. OHLEMEYER: On procedure, Your Honor, as you know those cases which Mr. Westbrook told you about are cases involving states suing tobacco companies. The issues are much broader in this case. And the fact that that case is over doesn't change the fact that the deposition is still sealed. And I think, procedurally, I don't think the Court should be as cavalier as plaintiffs' Counsel are suggesting about these pretrial deadlines.

We spent a lot of time and a lot of effort and a lot of our clients' money, quite frankly, asking the Court and receiving from the Court deadlines so that this case could proceed orderly and efficiently and not so that we would be here every day, you know, into jury time arguing about things that could or couldn't have

been on exhibit lists.

And for those reasons, Your Honor, procedurally, I think the evidence isn't proper in this case and substantively, as I've said under Rule 403, there can be no probative value in this case of Dr. Osdene's invocation of the Fifth Amendment due to ongoing criminal proceedings which Your Honor have already ruled are matters not to be addressed in the case.

MR. WESTBROOK: Your Honor, if I could just say a few brief things.

THE COURT: Go ahead.

MR. WESTBROOK: First as to Judge Folsom's intentions, Judge Folsom approved

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this settlement agreement with that provision, thereby he has approved us going to other courts seeking the Osdene and other materials being released.

And second, Your Honor, we certainly are not being cavalier about deadlines with the Court. Your Honor, in a case of this magnitude, this was a page that simply got overlooked. It was not cavalier. We filed a very large designation and we certainly

weren't trying to slip one over on anybody, as I think defense counsel certainly recognizes, the Osdene deposition is an important matter and through inadvertence the pages weren't given but there is no surprise.

THE COURT: Procedurally, Mr. Ohlemeyer is correct. What I have here is a federal district judge with an order sealing a deposition and I have nothing that indicates that he himself has unsealed that, so at this point we don't need to discuss the substantive matters raised in the motion. The motion will be tentatively sustained to exclude the testimony, the deposition testimony unless and until I receive an order unsealing this.

All right. I think that's all we needed to deal with this morning before we brought the jury in. Who will be your first witness for the plaintiff?

MR. HOWARD: Ralph Oden, Your Honor.

THE COURT: All right.

MR. WAGNER: Judge, if that's their

first witness, and I am anticipating, but I believe that this is another cumulative witness that's going to testify as to Mrs. Wiley and her trades and matters that have already been testified to at this point by Gary Wiley, Mrs. Addington, and Philip Wiley. And unless -- from what I know about Ralph Oden, I don't believe there is going to be anything other than that. And I would object to any cumulative testimony along those lines at this point.

THE COURT: Who is he, Counselor?

MR. HOWARD: That's Mildred Wiley's brother, Your Honor.

THE COURT: All right. What's the purpose of his testimony?

MR. HOWARD: He's going to talk about Mildred's life before, mostly before she met Philip Wiley until she was a student in school, growing up.

THE COURT: And this is probative as to what?

MR. HOWARD: To fill in what her life was like and that she never smoked and was not around smoking.

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We also, Your Honor, anticipate asking Mr. Oden some information about what his knowledge was about the risk, health risk associated with smoking prior to 1991.

MR. WAGNER: Of course, Your Honor, that's irrelevant again as to what a witness' knowledge was. He is not Mildred Wiley or someone who might know what her knowledge was. And I believe Counsel's description of the testimony that he intends to elicit from this witness is, indeed, cumulative.

THE COURT: Well, a part of it, perhaps, could be. What about the relevancy question on -- you want to prove what he knew about smoking?

MR. HOWARD: Your Honor, I think we might as well maybe get at this right now because we ran into the problem last Friday.

In their contentions they contend that Mildred Wiley was well-educated, medical professional, stayed current, she believed that exposure was harmful to her health. Also they contend that Mildred Wiley was at all times relevant, times aware of alleged

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health risk associated with ETS. They stood up and told this jury in opening statement, so let's wrap this up that you're going to hear in this case the risks associated with smoking have been well known and common knowledge for a long time.

Throughout their opening statement, they are showing their intent that they're going to try this case that Mildred Wiley had common knowledge that everyone else did that secondhand smoke could kill you. That it was harmful, that it had health risks associated with it. That that was common knowledge. It's all through their opening statement. It's through their contentions.

So it's very relevant as to what people knew, everyone that gets on that witness stand, if it's common knowledge, then that person, especially nurses and all of that that kept abreast and Ralph Oden, who is a minister and well educated and who read the periodicals, that we certainly should be able to stand up and ask those people did you take the Reader's Digest, did you stay abreast of health risks and what was your

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knowledge in 1991. Because Mildred Wiley isn't here. We can't call her to refute that.

So the only opportunity we have to refute their contentions to bring it for what they're basically saying is that she had this knowledge and, even though she knew it was going to kill her, she made a choice. And it gets back to their choice. She made a choice, and we should have the right to show that that was not an informed choice,

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that she did not have that common knowledge because no one else had it because the tobacco companies were hiding it and it wasn't common knowledge at the time she was exposed to their dangerous and defective product. So it goes back to the choice matter and common knowledge.

And, Judge, it's several places in their opening statement they have maintained that it's common knowledge and the whole world knows it. So it's not irrelevant. It goes to the very issue that we're talking about because, in order for anyone to make a choice as to whether or not she should work

in another hospital or leave her occupation because there was this smoke around that was going to kill her and she knew she had the knowledge that it was going to kill her. So it is very relevant to -- for this jury to know through witnesses that take that stand as to what their knowledge was to refute this idea that there was common knowledge.

THE COURT: Mr. Ohlemeyer.

MR. OHLEMEYER: The plaintiffs have to prove, Your Honor, that cigarettes are defective and unreasonably dangerous. To prove that they have to show they are more dangerous then contemplated by the ordinary consumer. That is on objective standard. The cases are very clear on that.

We have a witness who may testify as to what was common knowledge in the community. They have a couple of witnesses who purport to have information, expert witnesses, about historically what was common knowledge, what was known and what was unknown. The subjective knowledge of a specific individual is not probative of that issue. And lacks the evidentiary foundation that

Your Honor needs to or should require to have it admitted in this case.

What Mr. Oden may or may not have known isn't the issue. The issue is what was the ordinary consumer's knowledge, which is an objective standard. And then the question perhaps on current risk or some other defense dealings specifically with Mrs. Wiley. And Mr. Howard is right. Unfortunately, Mrs. Wiley isn't here to tell us that. But we have testimony from her husband about what he knew and what they did and their behavior from which the jury can infer things. You can't infer what Mrs. Wiley knew from what Mr. Oden or somebody else knows.

THE COURT: Mr. Cross.

MR. CROSS: Thank you, Your Honor. I appreciate the opportunity to be heard. This issue is going to come up on a number of times today, because of some of the witnesses who are going to be presented. I

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would just like to point out that there is really two dimensions of -- that this kind of evidence takes, and I think Mr. Ohlemeyer

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tends to confuse them.

As Mr. Howard indicated, they did all through their opening statement, and in their contentions raise the issue that Mrs. Wiley should have known better, that she worked there voluntarily when there was this risk of secondhand smoke that was painfully obvious to everyone by reason of common knowledge.

I think this particular excerpt is particularly emphatical on this point. This is from Mr. Ohlemeyer's opening statement on page 495 of the Richardson transcript. "And that is the world that Mrs. Wiley and Mr. Wiley grew up in. It's a world where they chose not to smoke, they chose not to associate with smokers, they didn't spend a lot of time with people who smoked. They did that by choice. They read and they heard and they believed the things that were written about cigarettes and cigarette smoking. Mrs. Wiley learned about them as a nurse. Her training as a nurse, no doubt, taught her about the health risks associated with smoking. She taught her children about

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the health risks associated with smoking. You'll hear she read magazines and newspapers during time periods and even some medical journals during time periods where articles were published about ETS and whether or not it was a risk to health. At the time she started working at the VA, Mrs. Wiley was aware of and believed that there might be risks to her health as a result of exposure to other people's tobacco smoke."

Now, in that context or in those passages, the defendants were telling this jury that Mrs. Wiley should have known better.

Now, at the same time elsewhere in their opening statement they said, page 543, "You're going to hear in this case the risks associated with smoking have been well known and common knowledge for a long time. Everybody knew that, not just Mrs. Wiley."

So that's the two dimensions. What Mrs. Wiley knew and what everybody knew. And I think it's -- on this record Mr. Oden -- Mrs. Wiley isn't here. We can't ask her what she knew. We can't ask her why

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she stayed in the job at the VA if she knew that secondhand smoke was possibly going to end her life. We can't ask her that. But we can ask her relatives. We can ask Mr. Oden what he knows about the extent of knowledge that Mrs. Wiley had.

And that, I believe, is what Mr. Howard

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is going to try and elicit from that witness. That is relevant. No one else can say what Mrs. Wiley might have known except the people who knew her. Those are lay opinions which we should be able to at least explore the basis of the knowledge.

THE COURT: That's not precisely what Mr. Howard indicated he was hoping to elicit from the witness.

MR. CROSS: I can't speak -- my understanding of what his testimony was was what he knew that Mrs. Wiley knew through what she had been exposed to those.

MR. WAGNER: I distinctly heard Mr. Howard say --

THE COURT: Go ahead, Mr. Wagner.

MR. WAGNER: I heard Mr. Howard say he intended to elicit from Mr. Oden what

Mr. Oden knew.

THE COURT: That's what he said.

MR. WAGNER: That's what he said. And it's quite simple, it seems to me, Your Honor, that nothing that Mr. Cross is telling the Court is going to be furthered by asking a witness what he knew. Because -- in the first place, Mr. Oden is her brother. As I understand it, he was a minister for many years. He wasn't there in the VA Hospital or whatever. And so what he knew or didn't know doesn't go to anything that Mr. Cross is talking about.

MR. HOWARD: Your Honor, I did say that I'm going to do that. They're trying to show that Mildred Wiley knew secondhand smoke was dangerous and could kill her but how did they know that? Because she's a nurse and she kept up on periodicals. You heard them ask the question. She read Reader's Digest and she did this and did that. And from that we're going to get an inference. And then they bring in these exotic articles, wherever they might appear, and drawing an inference of that, the fact

that she kept abreast of medical issues, we're going to infer from that that she had that knowledge that that smoke was going to kill her and she went ahead and decided, made a choice to work there anyway.

Certainly it should be probative. And even though it's cumulative, it's cumulative if the witnesses get up there and say -- we certainly should be able to ask a witness who has knowledge or has the same level of education, a nurse, her brother who is a minister and has a college degree, and ask him do you read periodicals, do you keep abreast of health issues, and did you know before 1991? Certainly we should be entitled to draw that inference from a number of witnesses that come up there.

THE COURT: I disagree. What

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Mr. Oden may have known 10 years ago, 20 years ago has no bearing on this matter.

Now, you may be able to get testimony as to -- well, I'm not going to say that. In any case, if there is an objection, if you would, to that, I'll sustain the objection as to what he may have known.

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I will bring the jury in in five minutes.

(A brief recess was taken.)

MR. CASSELL: All rise.

THE COURT: Be seated. Good morning, ladies and gentlemen.

ALL: Good morning.

THE COURT: Jury appears in its entirety, together with all the three alternates. We are ready for the next witness for the plaintiff, Mr. Howard.

MR. HOWARD: Thank you, Your Honor.

Good morning, ladies and gentlemen. Plaintiffs would call Ralph Oden.

THE COURT: All right. Raise your right hand, sir.

PLAINTIFFS' WITNESS, RALPH ODEN, SWORN

THE COURT: Would you have a seat right over there. Tell the jury your name.

THE WITNESS: My name is Ralph Oden.

THE COURT: Spell your last name.

THE WITNESS: O-D-E-N.

THE COURT: Thank you.

DIRECT EXAMINATION

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BY MR. HOWARD:

Q Mr. Oden, where do you live?

A [DELETED].

Q And how long have you lived there?

A Nearly four years.

Q And what is your occupation?

A I'm semi-retired from ministry.

Q And what church are you associated or affiliated with?

A The Brookhaven Wesleyan Church of [DELETED]

Q I'm going to take you back and ask you what year you were born, Mr. Oden.

A 1932.

Q And your parents' name?

A Charles and Ethel Oden.

Q And where were you born?

A Hong Kong, China.

Q And did I ask you the year, 19- --

A 1932.

Q How long did you live in Hong Kong?

A Approximately five years -- three years.

Q And do you have any brothers and sisters?

A My sister -- my brother is in the Philippines.

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Q And how old is your brother?

A She's five years younger than I.

Q And then you have a sister?

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A Yes, she's deceased. Mildred.
Q Mildred?
A Mildred Wiley.
Q When you came back to Hong Kong, how old were you at that time, Mr. Oden, when you left Hong Kong?
A I was not quite three.
Q And where did you move to then?
A Mother and dad moved shortly to Ohio -- to Indiana about in 1935, I think, or '36.
Q And then did the whole family live here in Indiana, come back to Indiana?
A Yes, for a short time.
Q And that included Mildred?
A Uh-hum.
Q And then where did the family move?
A We moved to Ohio. My dad took a pastorate in Ohio.
Q Was your mother a minister also?
A Yes. Yes.
Q And how long did you stay -- did the family stay in Ohio?

A One year.
Q And then where did the family, your family go to?
A We moved to Kentucky.
Q And --
A Dad pastored there.
Q How long did you stay in Kentucky?
A 17 years. I wasn't there the whole time.
Q When did you leave Kentucky?
A I was 14 when I left.
Q Where did you go?
A I went to Frankfort, Indiana.
Q Where did you go to Frankfort, Indiana?
A We had a college there and a high school, and I took my high school and college.
Q What was the name of it?
A Frankfort Pilgrim College.
Q Is it still there?
A No. It's gone long time ago.
Q Did Mildred later follow you there to Pilgrim High School?
A Yes.
Q And you would have been two years ahead of her in school?
A Yes.

Q During that period of time did you see Mildred on a regular basis?
A Oh, yes.
Q And how long did you stay there at Pilgrim High School -- did you go to college there also?
A Uh-hum.
Q So how long did you stay there in Frankfort going to college?
A I graduated in 1956.
Q And was Mildred still there when you left?
A No. She left in '55.
Q And do you know what she did after -- did she graduate from Pilgrim High School?

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A Yes. And she took her nurse's training at Lafayette.
Q Did you become acquainted with Philip Wiley about that time?
A Yes. Well, I knew him for several years.
Q Were you in school with Philip Wiley?
A Yes.
Q And after they married and left there for the remaining years, how often would you see Mildred?
A Probably three or four times a year, the

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family, the various families.
Q And after you left college there, you never lived in the same town that Mildred lived in; is that correct?
A That's correct.
Q Did you ever know Mildred to smoke a cigarette?
A No.
Q Reverend Oden, did you ever smoke a cigarette?
A Couple, three times.
Q And how old were you then?
A Probably ten. Ten or 11 years of age or less. I'm not sure. Maybe nine or ten, I suppose. My sister caught me smoking and went in and told my mom, and my mom got me down and prayed and promise I would never do it again and I haven't.
Q Never smoked since then?
A No, sir.
Q Did you ever have conversations with Mildred about what she thought about the health effects of smoke?
MR. WAGNER: Your Honor, object. This would all be hearsay.

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THE COURT: He can answer that yes or no.
Q Did you have any conversations with her about what she knew or what knowledge she had about the health risk associated with smoking?
A No.
Q Reverend Oden, in your ministry through the years, did you have occasion to go into hospitals?
A Yes, I did.
Q And did you have an opportunity to observe in those hospitals -- let me strike that.
What reason would you go into the hospital?
MR. WAGNER: Well, Your Honor, I'll object to this. This is all irrelevant as to what reasons this witness would go into other hospitals.
THE COURT: Sustained.
Q When you would go into other hospitals, Reverend Oden, would you notice if people were smoking in those hospitals?
MR. WAGNER: Same objection, Your Honor, it's irrelevant and immaterial to any

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issues in this case. It's not related to any of the facts or issues in this case.

THE COURT: Objection is sustained.

Q Reverend Oden, have you ever read newspapers on a regular basis?

A Yes.

Q Do you take any periodicals or any magazines?

A Yes.

Q Can you tell the jury some magazines that you take and read?

MR. WAGNER: Your Honor, I may be anticipating here, but again, this is irrelevant to any of the issues in this case as to what this witness may have read, what articles he may have read, what periodicals he subscribed to, what newspapers he may have received. It's all irrelevant to any of the issues in this case.

THE COURT: Sounds like it is, Counselor, unless this somehow relates to Mrs. Wiley.

Q Reverend Oden, did you ever have any discussions with Mildred Wiley about the health risks associated with environmental

tobacco smoke?

MR. WAGNER: Judge, I'm going to object. This is the same question that Counselor asked just a minute ago.

THE COURT: I think he asked that question and he answered no.

MR. HOWARD: I'll take that, Judge, thank you.

Q Did you ever go to the VA Hospital and visit Mildred?

A I stopped one time or two to see her.

Q Reverend Oden, from what you observed about your sister, Mildred Wiley, do you know if she had any knowledge of health risks associated with secondhand smoke?

MR. WAGNER: No foundation, speculation, Your Honor.

THE COURT: Sustained.

Q Reverend Oden, have you observed throughout your -- as far as you know, that Mildred never smoked; is that correct?

A That's correct.

Q And you knew that she worked at the VA Hospital?

A Yes.

Q And did you know if there was smoking in that hospital?

A Yes.

MR. WAGNER: Your Honor, objection, no foundation.

THE COURT: The last question was does he know whether or not there was smoking in the hospital?

MR. HOWARD: Yes.

THE COURT: He can answer that.

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A Yes.
Q From what you observed of your sister working in a smoking condition, did you observe that she did not have the knowledge that secondhand smoke -- of the health risks associated with her working there?
MR. WAGNER: Well, Your Honor --
MR. HOWARD: Yes or no.
MR. WAGNER: -- it's speculation. There is no foundation.
THE COURT: Rephrase that.
Q From what you observed of your sister working in a hospital where there was smoking, do you know whether or not she had knowledge about the health risks associated

with secondhand smoke?
MR. WAGNER: Well, Judge, there is no foundation laid this witness could read the mind of his sister based upon those kind of foundational facts. It's all speculation.
THE COURT: Sustained.
MR. HOWARD: No further questions.
THE COURT: Mr. Wagner.
MR. WAGNER: Defense has no questions, Your Honor.
THE COURT: Thank you, sir. Call your next, Mr. Howard.
MR. WAGNER: Who is the next witness?
MR. HOWARD: Betty Jeffrey.
MR. WAGNER: Max, to save time, can I take a look at your --
MR. HOWARD: No problem.
THE COURT: Good morning, ma'am.
THE WITNESS: Good morning.
THE COURT: Would you raise your right hand.

PLAINTIFFS' WITNESS, ROBERTA JEFFREY, SWORN
THE COURT: Have a seat right over there, please. Would you tell us your name.
THE WITNESS: My name is Roberta Jeffrey. I've always been called Betty.
THE COURT: All right. Would you spell your last name for us.
THE WITNESS: J-E-F-F-R-E-Y.
THE COURT: Thank you.
DIRECT EXAMINATION
BY MR. HOWARD:
Q Are you doing okay?
A Uh-hum.
Q Ms. Jeffrey, where do you live?
A Pardon me?
Q Where do you live?
A I live halfway [DELETED]

Q How long have you lived there?
A 72 years.
Q Are you employed?

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A No. I'm retired.
Q Where did you retire from?
A The VA Hospital in Marion.
Q How long did you work at the VA Hospital in

Marion?
A I began August 19th of '73, and retired November 26th, '97.
Q I want to find out a little bit about what you did there at the VA and what kind of employment. Can you tell the jury, let's just start with your first job, your first assignment, the type of job it was and what building you went to work in, if you remember.
A I trained on 138-2, which was a nursing home care unit, and I was there for eight or nine months, and then they assigned me to 138-4.
Q What kind of a job did you have, Ms. Jeffrey?
A I was a ward secretary.
Q And is that known -- do you have any other --
A When I started it was called a ward clerk. They now call them medical clerks.
Q So ward clerk, ward secretary, medical clerk, all the same?
A Right.
Q Basically is that the job, same type of job you had throughout the time that you were at

the VA?
A Yes.
Q Did you ever work in Building 16?
A Yes.
Q Can you tell the jury when that would have been that you worked in Building 16?
A I was assigned there, I forget the exact date the first time, and I was there for two years. And then I went back after being assigned to other buildings and was there for 16 continuous years. That's where I retired from.
Q And that would have been from '81-'97?
A '81 to '97.
Q Did you work on 16A or 16B?
A Both. I was assigned to both wards.
Q Now, let's explain a little bit to the jury Building 16 is how many stories?
A It's three stories.
Q Did they have patients on all three floors?
A They did when I first started there.
Q And then did there come a time when they didn't have on all three?
A No. Now there is just patients on two floors.

Q Two floors, and which floors would that be?
A 16A and 16B.
Q When you went to 16, I think you said your second time around in Building 16 was in -- started again in 1981, did they just have the two floors there at the time?

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A Yes.
Q Mrs. Jeffrey, I'm going to show you what has been marked as Plaintiffs' Exhibit 19-2A and ask you if you can identify what that shows or what that is.
A This area here --
Q Wait a minute. Just tell us in general what this is, what this drawing is.
A These are patient rooms down here. Is that what you mean?
Q Is this a floor plan of 16A?
A Yes.
Q And you've seen that before?
A Not this exact one, but I've seen several similar.
Q Okay.
MR. WAGNER: Can we approach for a second, Your Honor?
THE COURT: All right.

(Bench discussion.)
THE COURT: Are you going to offer that, Counselor?
MR. HOWARD: Yes.
THE COURT: Any objection to that?
MR. WAGNER: Could I just ask a couple of preliminary questions, Your Honor?
THE COURT: Go ahead, Mr. Wagner.
PRELIMINARY QUESTIONS BY MR. WAGNER:
Q Ms. Jeffrey, you didn't create this drawing, I take it?
A No.
Q Do you know who did?
A Probably architects. I don't know.
Q You don't know who created the drawing. Have you compared the drawing -- you mentioned you had seen other drawings of the building.
A I don't understand.
Q I thought I heard you say -- and perhaps I'm wrong -- that you had seen other drawings like this one.
A No. I've seen similar drawings where, before they remodeled the building.
Q Would it be fair to say, Ms. Jeffrey, that

you don't really know what's on this exhibit as being 100 percent accurate as to what it is supposed to depict?
A I would say it's very accurate.
Q Have you looked it over before you took the witness stand?
A Yes.
Q So you have looked it over and it looks accurate to you?
A Pardon me?
Q So you have looked it over and it looks accurate to you; is that right?
A Yes.
MR. WAGNER: I don't have any further objection.
THE COURT: Any objection to the offer, Mr. Wagner?

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MR. WAGNER: I have no further objections, Your Honor.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: No, Your Honor.
THE COURT: Plaintiffs 19-2A will be admitted.
(Plaintiffs' Exhibit(s) 19-2A received in evidence.)

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BY MR. HOWARD:
Q Mrs. Jeffrey, you also testified that you worked on the 16th floor, 16B. I mean 16B, the next floor up. Before I show you this, to eliminate any confusion, is what I have here -- did I show you this drawing and you just never seen it in this form before; is that the problem?
A That's the old one.
Q Okay. This is a copy of what we had blown up and put on to this.
A Okay.
Q I'm going to show you what's been marked as Plaintiffs' Exhibit 19-2B and ask you if you recall looking at this floor plan or if you can identify this.
A Yes.
Q And what is this?
A This is the floor plan of 16B.
Q Thank you. We would offer into evidence Plaintiffs' Exhibit 19-2B.
MR. WAGNER: Another preliminary question, if I may, Your Honor.
THE COURT: Go ahead.
PRELIMINARY QUESTIONS BY MR. WAGNER:

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Q What year is depicted on these drawings; do you know? That is to say, the building changed from time to time, I guess; is that right? Building 16, they did renovations and construction from time to time?
A I couldn't tell you what year. All the buildings have been remodeled several times.
Q Would it be true of both of these drawings, you don't know what year they would depict as to the configuration of the building; is that right?
A It's the present time. Is that what you mean?
Q It's present as we sit here today?
A Yes.
MR. WAGNER: Well, Your Honor, I'm not so sure it has any relevancy to the issues in this case.
THE COURT: I'm not sure I understood her testimony. Is that what the Building B, what the building is today or what it was five years ago? Why don't you ask her.
MR. HOWARD: Okay, Your Honor, we're only concerned about the day room and

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the nurse's station in general in A. And in 16B we're concerned about the nurse's

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station, the day room and nothing in particular about remodeling on the building. So if I could --

BY MR. HOWARD:

Q Mrs. Jeffrey, this is 19A, and this area here which, according to this, shows the day room, is that where the day room was all the time that you worked there in that building?

A That is correct.

Q And here is the nurse's station, 104. Is that where the nurse's station was all the time that you were there in the building?

A That is correct.

Q And that's never changed?

A No.

Q And if there was any remodeling that Mr. Wagner asked about, that had nothing to do with that area?

A No.

Q Now we'll go to 16B. Does this show the day room on 16B, 216?

A That's right.

Q Does that show the nurse's station?

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A Right.

Q And does it show the break room on 16B?

A That was this area here.

Q Is that the same as it was when you worked there?

A Yes.

Q And it's still that's what is shown here?

A Yes.

Q Even though this drawing may say 1994 on it or 1997, it's had some changes. But that has not changed?

A No.

Q And that was the way it was all the time you worked there?

A Right.

THE COURT: Any objection to B, Counsel?

MR. WAGNER: No objection, Your Honor.

MR. OHLEMEYER: No objection.

THE COURT: Plaintiffs' Exhibit 19-2B will be admitted. Go ahead, Counselor.

(Plaintiffs' Exhibit(s) 19-2B received in evidence.)

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BY MR. HOWARD:

Q Mrs. Jeffrey, while we're at it, could I ask you to step down here a minute.

A Sure.

Q I'm going to show you Plaintiffs' Exhibits 19-2A, and I'm going to give you a red marker, and if you could for the jury just mark in red just kind of outline where the day room was.

A (Witness complies with request.)

Q Let me have you use red also, and if you would just kind of outline the -- where the nurse's station was.

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A (Witness complies with request.)
Q Now, there appears to be, in looking at 19-2A, that there is a wall or something here between the day room and the nurse's station.
A It was a counter.
Q A counter?
A Yes. It was open up above.
Q No wall. Okay.
When you worked on 16A, exactly -- did you have a desk there?
A Yes, I did.

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Q And would you for the jury mark an X on where your desk was.
A (Witness complies with request.)
Q And let's -- on where you've made the counter was, can you go ahead and just make a squiggly line on that so that we'll know that that's a counter.
A (Witness complies with request.)
Q You can have a seat. I'll probably get you back up here.
A Okay.
Q When you went back to Building 16A to work, I believe, in 1981, do you know who the staff nurse was on Building 16A in 1981?
A Who were the staff nurses?
Q Who was the staff nurse on 16A? Did you know who the staff nurses were?
A Mildred Wiley, Monica Polson. Do you want the day shift and the PM shift?
Q Did Mildred Wiley work on the day shift?
A Primarily.
Q All right. And that's the same shift you worked -- or what shift did you work?
A I worked from 7:45 to 4:30.
Q And where would the staff nurses be located?

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Did they have a desk?
A Yes, they did.
Q And did they all have the same desk; they just used it for different shifts?
A No. Their desk was up under the counter right in front of mine.
Q I'll just bring the drawing to you this time, okay. I'll ask you, if you could, for the jury to put an X on where that, the desk would be for the staff nurse.
A (Witness complies with request.)
Q When you said that Mildred Wiley worked primarily days, do you know what other shift she worked or did she do that on a regular basis, work another shift?
A She worked other shifts sometimes which would be from 3:00 to 11:00. Pardon me. It was from 4:00 to 12:00. And the night shift was from midnight to 8:00 in the morning.
Q Is that something all the staff nurses did, was to rotate?
A Yes.
Q Or what would it -- what would be the occasion that she wouldn't be there working

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days? Why would she not be there days

working?
A They needed the staff on another shift.
Q So she would basically fill in on another shift?
A Yes.
Q But the day shift was her regular shift?
A Yes.
MR. WAGNER: Well --
Q Now, as a ward clerk working there in 16A, did you have occasion to go up to 16B also?
A Yes, I was assigned to both floors.
Q While we're marking the exhibits here, let me -- maybe you could step down and we'll mark this one up.
I want to ask you to mark for the jury three areas. First of all, 16B, would you mark the day room and just kind of outline it, the three sides of it.
A (Witness complies with request.)
Q And could you, using the -- that red, could you also mark the location of the nurse's station.
A (Witness complies with request.)
Q And could you also mark with that red pen where the day room -- where the break room

is located.
A That's -- three sides of it? (Witness complies with request.)
Q Now, once again, up in the 16B, the line that appears here between the nurse's station and day room, was that a wall or a counter?
A No. That's a counter.
Q All right. Could you take the green and just make a little squiggly there so that we know that that's a counter.
A (Witness complies with request.) This is a counter.
Q Thank you. When you started at the VA, you started in what building, again, if you recall? What building did you start when you started with the VA?
A I trained on 138-2.
Q Was there smoking in that building?
A Yes.
Q Did the patients smoke in that building?
A Yes.
Q The staff smoke in that building?
A Yes.
Q You've told the jury you've worked in a

number of other buildings at the VA.
A Yes.
Q In all of those buildings were there any exceptions? Was there a building where the patients and the staff did not smoke?
A No.
MR. WAGNER: Your Honor -- never mind.
THE COURT: What was your answer,

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ma'am?
THE WITNESS: No.
Q When you worked in 16A, did you observe patients smoking? Did you see patients smoking in 16A?
A Yes.
Q Did you see staff smoking?
A Yes.
Q Tell the jury a little bit about what you observed. Let's start with the day room and see what you observed about the smoke in the day room.
A It was very thick and concentrated. The patients down there weren't able to smoke themselves, so the staff would put the cigarette in their mouth and light the

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cigarette and take it out periodically, and that's how they smoked.
Q Were these patients that could not leave the building?
A Right. They didn't have privileges.
Q Now, could some of them smoke themselves, I mean, actually hand the cigarette?
A Very few on 16A.
Q And would they congregate, would they be located in the day room during the day?
A Yes.
Q How many on a typical day, how many would be -- let's get a point in time when you first went there, 1981 when you went back there. Can you tell the jury about how many people you would see at a time -- let's talk about patients first -- smoking in that day room.
A They took the majority of the patients to the day room. If they were seriously ill they left them in bed, but I would say if the capacity is 18 on that ward, and there would be probably 16 of them in the day room.
Q And some of them were able to smoke for

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themselves and some of them had to be helped to smoke?
MR. WAGNER: Objection, Your Honor, leading.
THE COURT: The last was leading.
Q All right. Sorry. Some of them could smoke for themselves?
A Yes, a few.
Q Did you see any staff people smoking in the day room area?
A Yes.
Q Who would you see smoking in the day room area? What would the staff be -- what would that consist of?
A Pardon me?
Q Who did you see, what staff titles or jobs, who would be smoking?
A The nursing assistants and the RNs.
Q Some of the RNs also smoked?
A Some of them, yes.

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Q What about the nurse's station; was smoking when you got to Building 16A in 1991, was smoking allowed in the nurse's station?
A Yes, it was. They would come in to do their charting on the charts, and light up their

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cigarettes and a lot of times would leave the area with their cigarettes smoldering in the ashtray to go do something else and come back.
Q Mrs. Jeffrey, are you familiar with a discolorment that is sometimes left on surfaces by tobacco smoke?
A Pardon me?
Q Are you familiar -- are you having a problem hearing?
A Yes, I do have a problem with my hearing.
Q All right. Mrs. Jeffrey, are you familiar with a discoloration --
A Oh, yes.
Q -- that is left by tobacco smoke?
A Anytime --
Q Okay.
A -- you would take a damp cloth and rub over the file cabinets, the desks, the chart rack, you had a yellowish brown stain.
Q Can you describe for the jury what kind of charts you used, what the charts were made of?
A They used plastic charts, and I would clean them periodically, and the best way I can

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clean them was to clean some charts there and put the material in the clean charts and then I would empty up and take the dirty ones home and clean them. I have taken hundreds of charts home to clean.
Q During this period of time were you a smoker?
A No.
Q Have you ever been a smoker?
A No.
Q Did that smoke affect you there at the --
A Yes.
MR. WAGNER: Excuse me, just a minute, Your Honor. Objection. Not relevant.
Can I put this down for now?
THE COURT: Please.
MR. WAGNER: Objection, Your Honor, as to relevancy.
THE COURT: The last question, that objection is overruled. You may answer.
The question was did the smoke affect you.
A My eyes would water, and I would cough.
Q Mildred Wiley was working at a desk right in

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front of you?
A Yes.
Q And would you see her at other locations in the hospital?
A Oh, yes. She was -- she was an hands-on

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worker. She was everywhere.
Q Did she spend much time at this desk?
A No. Just when she had to, to get her paperwork.
Q Would you see her over in the day room?
A Yes.
Q Did you ever have occasion to see her on 16B?
A Yes.
Q Can you tell the jury about what you observed when you saw her on 16B. First of all, why would you go to 16B when Mildred Wiley was up there?
A To take off doctors' orders, to transcribe, make appointments.
Q Did you ever go to the break room on 16B?
A Yes.
Q Can you tell the jury what you observed about the smoke conditions in the break room at 16B.

A They had a break area that they had their morning meetings in, and on occasion I would need to take telephone messages to Mrs. Wiley. And when I would open the door to go in there, it was just blue with smoke.
Q And did you have an opportunity to observe Mildred Wiley in the day room on 16B?
A Yes.
Q And what were the smoke conditions like there on 16B?
A The same. We had some patients that weren't able to hold their cigarettes, and she would what they call smoke them.
Q And did you ever see her in the nurse's station on 16B?
A Yes.
Q I think you just told the jury that Mildred Wiley would smoke the patients. Why would you remember that?
A Well, I made the remark one time that that was probably the only time -- we always called her Millie, the only time that Millie ever held a cigarette in her hand was when she was smoking the patients.
Q Now, we say "smoke the patient," she

wouldn't put the cigarette in her mouth, would she? She would just put it in their mouth?
A Yes.
Q By the way, did you ever know a man there at the VA by the name of John Chrisman?
A Yes, sir.
Q Do you know who he was?
A He was the director of the hospital.
Q Do you know when he was the director?
A Not right off.
Q If I told you he was the director --
MR. WAGNER: Objection, Your Honor, it's going to be leading and suggestive. I can tell.
THE COURT: Sustained.

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MR. HOWARD: I'm not going to say it then, Judge.
Q Getting back to Mr. Chrisman, your desk is -- continued to be right here until 1997 when you retired?
A Right.
Q Do you recall at any time during the years that you worked there whether that would be the early '80s, late '80s or what that you

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ever seen Mr. Chrisman in that building?
A No.
Q Did there come a time that you can recall, Betty, that -- I'm sorry. I've talked with you an awful lot. It's Mrs. Jeffrey, I'm sorry -- that they restricted the smoking there on 16A?
A The building became smoke free on November the 1st of '92.
Q Is that the first you recall about any restrictions, Betty? Mrs. Jeffrey?
A I think they had brought it to our attention that smoke was hazardous before that.
Q Betty, did you know -- what did you think about the smoke that was around you as you worked there in 16A?
MR. WAGNER: Objection, Your Honor, as to what the mental processes of this witness were.
THE COURT: Why don't you make your question more specific, Counselor.
MR. HOWARD: All right.
Q Did you like the smoke there that was around you?
A No.

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Q Did you have conversations with Mildred Wiley about the smoke that was there in 16A and 16B?
MR. WAGNER: Objection, Your Honor, it's going to be hearsay.
THE COURT: She can answer that yes or no.
Q Did you ever talk with Mildred Wiley, Mrs. Jeffrey, about the smoke that was there?
MR. WAGNER: Yes or no.
A Yes.
Q I think you've told us you didn't like it, did you?
A Right.
Q Did you ever file a complaint with the --
A No.
Q Why didn't you file a complaint, Mrs. Jeffrey?
MR. WAGNER: I'm sorry, Mr. Howard. Objection, Your Honor, as to what her mental processes were, motivations were. She can testify to facts or what she did or didn't do but she can't testify to her mental process.

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And one more objection, Your Honor, her

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motivation is not an issue in this case, so it's irrelevant.

MR. HOWARD: Can I have one more response, Judge?

THE COURT: Sure.

MR. HOWARD: They have talked with this jury about Mildred Wiley didn't file a formal complaint.

MR. WAGNER: I object to these speaking objections and arguments before the jury of this type.

MR. HOWARD: We don't have record --

THE COURT: The objection is overruled. You can answer the last question. He asked you why you didn't file a complaint.

A We didn't think there was anything we could do about it. We accepted that as part of our environment.

Q Did you have any knowledge or information at that time as to the health risks associated with secondhand smoke?

MR. WAGNER: Your Honor, objection,

as to --

A No.

THE COURT: I'll sustain that objection.

MR. WAGNER: Move the answer go out.

THE COURT: Her answer will go out. The jury will disregard the response.

Ma'am, if there is an objection by one of the attorneys, I do not want you to answer until I tell you. Okay. Thanks.

MR. MOTLEY: Your Honor, may we approach for a moment?

THE COURT: Sure.

(Bench discussion.)

THE COURT: Continue, Counselor.

BY MR. HOWARD:

Q Mrs. Jeffrey, did Mildred Wiley ever make any statements to you or express any concern that she -- about her employment at the VA due to the possible health risks associated with secondhand smoke?

MR. WAGNER: Your Honor, again I object again --

THE COURT: You do not have to

answer that, ma'am. That objection is sustained.

Q Mrs. Jeffrey, before 1991, did you ever receive any bulletins or any information from the VA Hospital concerning possible health risks associated with environmental tobacco smoke?

MR. WAGNER: Your Honor, objection. That would call for hearsay as to what was in a document.

THE COURT: Overruled. You may answer that, ma'am.

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A No.
Q Mrs. Jeffrey, before 1991, did you ever receive any type of warning from the VA Hospital concerning possible health risks associated with environmental tobacco smoke?
MR. WAGNER: Objection, Your Honor, as to what this witness may or may not have received, and it calls for this witness to testify about hearsay.
THE COURT: Overruled. You may answer that, ma'am.
A No.
Q Before 1991, did you ever receive any

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publications from tobacco companies concerning possible health risks associated with environmental tobacco smoke or what is referred to as secondhand smoke?
MR. WAGNER: Same objection, Your Honor, as to the previous question, plus there is no foundation laid that she was in a position to receive anything from any tobacco companies.
THE COURT: Is your question during her employ or at her employment? I don't understand your question. Make it more specific.
MR. HOWARD: All right.
Q Prior to -- before 1991, did you receive any information in any form from the tobacco industry about the health hazards associated with secondhand smoke?
MR. WAGNER: Now, Your Honor, again we object for the reasons previously stated. It's irrelevant as to what this witness may have received.
Secondly, she would be testifying to hearsay.
Thirdly, there is no time frame

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specified here except some broad time frame. We're also objecting on the basis of preemption, Your Honor, as previously briefed in this case.
And fourthly, there is no foundation laid that this witness would be in a position to have received anything of that nature.
MR. HOWARD: Judge, I forgot the other three, but I know one, and it's not hearsay. That is not an answer calling for hearsay.
Q You are a resident of the United States, aren't you?
A Yes.
Q And lived in [DELETED]?
THE COURT: I'm going to overrule the objection. Now repeat your question.
Q Before 1991, did you ever receive any information in any form from the tobacco companies as to the health hazards associated with secondhand smoke?
MR. WAGNER: Same objection.

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A No.
Q Now, Mrs. Jeffrey, there came a time that

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Mildred Wiley wasn't at work anymore. Do you recall that, when she got sick?
A It was May of '91, I believe.
Q Did you ever go to the hospital and see her?
A Yes, I did.
Q How often did you go, Mrs. Jeffrey?
A I went every day when I was on vacation.
Q How long was your vacation?
A A week.
Q Do you know what point in time that would have been?
A Pardon?
Q Do you know when that would have been, what, early May or late May, June?
A It was either May or June of '91.
Q Did you spend time there in the hospital with Mildred? How much time would you spend there with her normally?
A Ten, 15 minutes.
Q Did you observe her condition when you were there?
A Yes.
Q Can you tell the jury a little bit about what you observed about Mildred.
MR. WAGNER: Objection, Your Honor,

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this is cumulative.
THE COURT: I didn't hear you.
MR. WAGNER: Objection. This is cumulative.
THE COURT: Overruled.
You can answer the question, ma'am. He asked you generally what Mrs. Wiley's condition was.
A Seriously ill.
Q Did you observe, if you did, if she was in any pain?
A Pardon me?
Q Did you observe if she was in any pain?
A Yes.
Q Did you know what the nature of her illness --
MR. WAGNER: Well, Your Honor, objection. No foundation.
THE COURT: You can answer that yes or no.
Q Did you know the nature of her illness?
A Yes.
Q How did you find that out?
MR. WAGNER: Well, this would call for hearsay, Your Honor, obviously. How did

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you find that out, she's going to relate what somebody else told her.
THE COURT: He didn't ask her to do that.
Did you talk to a doctor?
THE WITNESS: No.
THE COURT: A family member?
THE WITNESS: I'd say it was from

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the word of mouth from the VA.
THE COURT: All right.
MR. WAGNER: Hearsay, Your Honor.
THE COURT: Go ahead.
Q Do you know the nature of her illness?
MR. WAGNER: Hearsay, Your Honor.
THE COURT: Sustained. You do not have to answer that. You don't have to answer.
Q Mrs. Jeffrey, based upon your observations of Mildred and the way she carried on her day-to-day activities and lived her life, did you -- from your observations, did she have any knowledge as to the health risks associated with secondhand smoke?
MR. WAGNER: Your Honor, objection, no foundation.

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THE COURT: Sustained. You do not have to answer that, ma'am.
Q Mrs. Jeffrey, do you have an opinion, based upon what you observed about Mrs. Mildred Wiley, as to whether Mildred was educated regarding the health risks associated with secondhand smoke?
MR. WAGNER: Objection, Your Honor. No foundation. Calls for speculation on the part of this witness.
THE COURT: Whether she was educated.
MR. HOWARD: Whether she had knowledge and information about the health risks associated with secondhand smoke.
MR. WAGNER: There is no foundation laid at all as to that question, Your Honor.
THE COURT: She can answer that specific question.
You may answer that specific question.
A No.
Q From your observations of Mildred Wiley in the workplace, did you know she was unaware of the health risks of secondhand smoke?
MR. WAGNER: I'll object. Once

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again, this is sheer speculation.
THE COURT: Sustained as to that.
MR. HOWARD: I have no further questions. Thank you, Mrs. Jeffrey.
THE COURT: Mr. Wagner, do you have any questions?
MR. WAGNER: I have a few, Your Honor.

CROSS-EXAMINATION
BY MR. WAGNER:
Q Mrs. Jeffrey, just so the record is clear, you were at all times that you worked at the Veteran's Hospital a medical clerk and not a nurse; is that correct?
A I didn't understand the question.
Q Let me rephrase it, and I'll try to speak up a little bit.
A Thank you.
Q But don't think I'm yelling at you. I'm

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just going to speak a little louder so you can hear me. Can you hear me all right?
A Yes.
Q Just so the record is clear, during the entire time that you worked at the Veteran's Administration Hospital, you were a medical

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clerk and not a nurse; isn't that correct?
A Yes.
Q And do you know the plaintiff in this case, Philip Wiley?
A Yes.
Q And you knew Mrs. Wiley, as you've already testified; correct?
A Yes.
Q And you've been in the Wileys' home on a few occasions, have you not?
A Yes.
Q And visited with them at their home, with Mr. and Mrs. Wiley while Mildred Wiley was still living?
A Mr. Wiley wasn't at home when I was there.
Q You went there to visit Mildred?
A I went for lunch.
Q For lunch. And you said that Mr. Howard has talked to you -- or I guess he said he talked to you a few times. How many times has Mr. Howard talked to you?
A I didn't understand that.
Q On how many different occasions has Mr. Howard talked to you?
A I'd say three, four.

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Q And you consider Mildred Wiley to be a friend, isn't that so?
A Yes.
Q And you also consider yourself to be a friend of Philip Wiley; is that so?
A Yes.
Q I want to look at my notes here for just a moment and may skip over some things that have been said already.
These patients that were in Building 16 on the first floor were patients who couldn't for the most part take care of their daily needs; would that be correct?
A Yes.
Q Some of them were on tubes?
A Right.
Q They were fed by tubes?
A Yes.
Q Some of them were bedfast and couldn't get out of bed?
A Yes.
Q Had patients there that couldn't walk?
A Right.
Q And some of them were psychotic patients?
A Yes.

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Q Some of them were on oxygen from time to time?
A Yes.
Q A lot of those patients, I would guess, were

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also up in years. Is that so?
A Pardon?
Q A lot of those patients on the first floor of Building 16 were up in years.
A Yes.
Q Older than you and I?
A Yes.
Q Now, all of those patients didn't smoke, did they?
A No.
Q And all of the staff didn't smoke; isn't that correct?
A Not all.
Q Now, the hospital that you worked in was a Veteran's Administration Hospital; correct? Did you hear my question?
A I didn't understand it.
Q The hospital that you worked in was a Veteran's Administration Hospital.
A Yes.
Q It was run and operated by the Veteran's

Administration.
A That's right.
Q And the Veteran's Administration is a part of or an agency of the United States government; isn't it?
A Yes.
Q And you knew that when you worked there?
A Yes.
Q And whatever restrictions there were that allowed people to smoke or not smoke in that hospital, that was done by the Veteran's Administration. They had the right to make the rules; isn't that correct?
A Yes.
Q And, in fact, they did make the rules, didn't they?
A Yes.
Q And if the nurses had to help the patients smoke, that was a duty that was imposed upon them by the Veteran's Administration; isn't that correct?
A People in charge.
Q Right. Did the Veteran's Administration that ran that hospital require you to have an annual physical?

A No.
Q Did they require the nurses to have annual physicals?
A Yes.
Q One of the things Mr. Howard asked you about was when Building 16 became smoke free. Do you remember that? You have to answer out loud so this lady can get down your answer.
A You want the date?
Q You already told us the date. I was just asking you if you remember the question that Mr. Howard asked you about that subject.
A Yes.
Q And I think you told him it became smoke free in November of 1992; is that correct?

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A Yes.
Q Now, isn't it a fact that that smoking policy actually went into effect in early 1991?
A I -- it's possible, but from my notes, I had put '92.
Q And weren't there restrictions on where people could smoke in that hospital and who could smoke in that hospital before 1991? Is that -- have I confused you?

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A No. But I really couldn't -- I don't know the date.
Q But you do know that there were restrictions on where people could smoke in that hospital before 1991; correct?
A Yes.
Q But you just don't remember the date.
A Right.
Q And if I asked you where those places were where people could or could not smoke, you couldn't tell me that either, I guess; right?
A The employees went out on the porch.
Q The employees went out on the porch to smoke?
A Or out on the back door.
Q You were in a position, weren't you, to see what nurses all did? Let me break the question down.
In your job as a medical clerk, you were able to see what people like Mildred Wiley, who were nurses, did on a day-to-day basis; right?
A Yes.
Q And they had a lot of different duties,

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didn't they?
A Yes.
Q For example, they had to feed the patients.
A That's right.
Q And they had to administer medication to the patients.
A Yes.
Q And they would have had to chart the patient's progress.
A Yes.
Q And do you know what a chart is, where you've got to go in and get the chart at the bed and write down on it how the patient is doing and what happened to him and all that. Right?
A Yes.
Q And nurses had to check on the patients from time to time, especially on Building 16 where they weren't in very good shape. Right?
A Yes.
Q And they had to make rounds from time to time; right?
A Yes.
Q And I suppose there were doctors that came

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into that Building 16 and looked after those patients; right?
A Yes.
Q Wasn't just the nurses that were in there taking care of them, but the doctors came in; right?
A Yes.
Q And when the doctors came in, the nurses had to help out the doctors to -- in some cases to administer to the patients; right?
A Yes.
Q And talk to the doctors about the progress that the patient was or was not making; correct?
A Yes.
Q And nurses also had to go to meetings sometimes, didn't they?
A Yes.
Q And they had to go to committee meetings?
A Yes.
Q And so sometimes those committee meetings were in another building?
A Yes.
Q Sometimes they even had to go to seminars and things that were not even in the

hospital; right?
A Yes.
Q And some of these patients that couldn't walk had to be transported to places from time to time; right?
A Yes.
Q Like if they had to go to the X-ray room or something like that, they would have to take them; right?
A Yes.
Q And they had to administer oxygen to these patients from time to time; correct?
A Yes.
Q And there were nursing assistants that worked in Building 16; right?
A Yes.
Q And staff nurses like Mildred Wiley had to supervise those nursing assistants, didn't they? I'm sorry. Let me repeat. There were nursing assistants in Building 16, that worked in Building 16?
A Yes.
Q Nursing assistant is not a nurse but they do some of the chores and the things that nurses do; right?

A Yes.
Q And the staff nurses like Mildred Wiley had to supervise those nursing assistants; correct?
A Yes.
Q And visitors would come into the hospitals and see the patients from time to time; right?
A Yes.
Q And when that would happen, sometimes the nurses would have to talk to the visitors

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about how the patient was getting along that they came to see; correct?
A Yes.
Q And I guess there were some emergencies that would take place every once in a while.
A Yes.
Q On that ward where somebody might -- their heart might stop or they might need something, and those nurses had to deal with those things, too, didn't they?
A Yes.
Q And so these nurses didn't just stand around in the day room all day, did they?
A No.

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Q They didn't stand around in the nurse's station all day, did they?
A No.
MR. WAGNER: Thank you.
THE COURT: Thank you.
Mr. Ohlemeyer.
MR. OHLEMEYER: Just a couple, Your Honor.
BY MR. OHLEMEYER:
Q Mrs. Jeffrey, my name is Bill Ohlemeyer. I only have a few questions for you.
You told us about a break room. Do you remember that this morning?
A Upstairs in 16B.
Q Who used the break room?
A The staff.
Q The patients -- it wasn't a break room for the patients, was it?
A No.
Q And I want to make sure I understand something you said about Mr. Chrisman. Is it your testimony that Mr. Chrisman was never in Building 16 or that you just never saw him there?
A Well, I never saw him.

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Q Do you know whether he was ever in Building 16?
A I'm not aware of it.
Q So if he told us that he had been in Building 16, would that --
A He could have been.
Q There is no reason, there was no restriction or any reason why he couldn't have been?
A No.
Q You told us a little bit about the shifts that nurses work. There was a day shift.
A Right.
Q And then you said sometimes they would rotate to a night shift.
A Yes.
Q Then there were times when they would have to fill in on a night shift.
A Yes.
Q So there were -- a nurse could find his or herself working three different shifts, depending on what their regular shift was?
A Possible.

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Q What their regular rotation was, and who needed help?
A That's right.

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Q When you worked at the hospital, were you a member of a union?
A Pardon me?
Q Were you a member of the union at the hospital?
A No.
Q Were the nurses members of the union?
A Some of them were, I think.
Q Do you know what the union -- what a union is and what it does?
A I'm aware it exists.
Q Did you ever become aware of any of the grievances or the complaints that the union made about working conditions at the hospital?
A I've read articles.
Q Articles about the union?
A About the union.
Q And while you were employed at the hospital, from time to time did you become aware that the union made complaints about various things to the administration?
A Yes.
Q That was a procedure that was in place and was used?

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A Yes.

MR. OHLEMEYER: Thank you. That's all I have.

THE COURT: Redirect, Mr. Howard?

MR. HOWARD: Your Honor, could I ask permission to ask a couple of omitted questions?

THE COURT: Go ahead.

OMITTED QUESTIONS BY MR. HOWARD:

Q Mr. Wagner asked you about something about your duties there as a clerk. As your duties as a clerk, did you ever have to order supplies?
A Yes, I did.
Q Would you tell the jury some of the supplies that you would order.

MR. WAGNER: Judge, this is outside the scope and I think it's irrelevant in addition to that. It's outside the scope of redirect examination.

THE COURT: He asked permission.

MR. WAGNER: I do understand that, Your Honor, but it's also irrelevant as to supplies that she ordered.

THE COURT: Are you going to tie

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this up?

MR. HOWARD: I'll tie it up, Your Honor, I promise.

THE COURT: Go ahead.

Q Did you order supplies?
A Yes.
Q And what kind of supplies did you order?

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A Shaving supplies, body lotions, cigarettes.
Q Did you order -- who did you order the cigarettes for?
A Pardon me?
Q Who would you order cigarettes for?
A If the patients were unable to go to the canteen and handle their own money, then we were permitted. If the staff told me that they needed cigarettes, I would order them on a purchase order and send it to the canteen, and the canteen delivered it to the ward.
Q Okay. Last omitted question. Do you remember any of the brands that you ordered?
MR. WAGNER: Could I approach, Your Honor?
THE COURT: All right.
MR. WAGNER: Need to approach.

THE COURT: All right.
(Bench discussion.)
THE COURT: Thank you.
Mr. Howard, any other questions for this lady?
MR. HOWARD: Yes, Your Honor. Thank you for allowing me to ask the omitted questions.
THE COURT: All right.

REDIRECT EXAMINATION
BY MR. HOWARD:
Q Mrs. Jeffrey, Mr. Wagner asked you about you being a friend of Mildred Wiley, friend of Philip Wiley, visiting in their home and talking to me how many times, three or four. That doesn't in any way affect -- you wouldn't come here and tell anything but the truth, would you, Mrs. Jeffrey?
A What was the question?
Q Your association with Phil Wiley and Mildred Wiley and your talking to me a few times, would that have anything to do with whether or not you're telling the truth here?
A Oh, no.
Q Did you come here to tell the truth? And

you would tell the truth regardless of how good a friend Mildred Wiley and how much you loved her?
A That's right.
Q And what you thought or didn't think of me?
A Yes, sir.
Q Thank you. Mr. Wagner asked you about the patients that could smoke. Would you say while you were there during that period starting in 1981 -- and let's just use that date. In 1981, in the early '80s, maybe, what would you say, what percentage of the patients smoke, if you know? Just more than half or can you tell the jury what you believe about what you observed about the number of the percentage of patients that smoked? If you know.
A I don't know what the percentage would be.

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Q Would you say the majority?
MR. WAGNER: Well, Your Honor, leading, suggestive.
THE COURT: Sustained. You asked her, she said she didn't know.
MR. HOWARD: Well, she said percentage.

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THE COURT: Your word.
Q When Mr. Wagner asked you about the nurses running back and forth doing different things, if a nurse was doing something down here and wanted to go down here, would they have to pass through this area here?
A They would have to pass between the -- not between.
Q They would pass through between the area between the --
A Pass by the nurse's station and the day room.
Q Pass by the day room?
A Yes.
Q Now, if they went to a meeting -- Mr. Wagner asked about them going to meetings. If they went to a meeting up here in 2-17, would there be smoke in there, if you know?
A Yes. I'm sorry. When I told you they would pass by, I thought that was 16B. On 16A, they would pass through. On 16B they would pass by.
Q Okay. Because there on 16B they're both on the same side.
A There's a hallway between.

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Q Do you know if they allowed smoking -- did you ever see anybody smoking in the hallways, Mrs. Jeffrey?
A I don't remember seeing them do that.
Q Mr. Wagner asked you about the VA permitting by their rules smoking in that area. Do you know why smoking was permitted in the nursing station at the VA Hospital when you were there?
MR. WAGNER: Objection, Your Honor. No foundation and it calls for commentary as to why.
THE COURT: Sustained.
MR. WAGNER: Can I put this down?
THE COURT: Please.
Q Mrs. Jeffrey, based upon the fact that the VA permitted the smoking, does that observation give you an opinion as to whether or not the Veteran's Administration knew of the hazards of secondhand smoke that they were subjecting their --
MR. WAGNER: Objection, Your Honor, no foundation, speculation.
THE COURT: Objection sustained.
Q Mr. Wagner asked you about the smoking

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restrictions. While you were there up until, I think you said 1992, were you aware that they ever restricted the smoking in the

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day room on 16A?
A In '92?
Q Yes. By the patients? Could the patients smoke in the day room up until 1992, the best of your recollection? Could they or couldn't they, up until 1992. Patients.
A I'm confused.
Q Okay. Mr. Wagner asked you about restrictions, that smoking became restricted in certain parts of the building before 1992.
A Yes.
Q In 1992 you told the jury that the building went smoke free. Before the building went smoke free, did it ever change that the patients could always smoke in the day room until the time it went smoke free?
A Yes.
Q Do you recall if the restrictions had mostly to do with patients or staff, if you recall?
A Both.
Q The restriction. That's when it went smoke

free.
A Right.
Q Your shift hours were what again? What were your normal shift hours?
A From 7:45 to 4:30.
Q And for the nurses, what was the --
A From 7:30 to midnight.
MR. WAGNER: Your Honor, this is all repetitious.
THE COURT: We've been through this.
THE WITNESS: I'm sorry.
THE COURT: I was talking to him.
MR. HOWARD: It's not your fault. It's mine. You're answering my questions. I'm just asking the wrong questions.
Q If Mildred Wiley worked the second shift, her hours would have been what again?
A Second shift?
Q Yes.
MR. WAGNER: All repetitious, Your Honor.
A It would be 4:00.
Q Let me -- did the nurses come in -- was there an overlap between the nurses when

they came in between the first shift and the second shift?
MR. WAGNER: This is outside the scope.
A Yes, they were to be there ten minutes.
MR. WAGNER: Outside the scope. This is outside the scope of redirect examination, proper redirect examination.
THE COURT: I'm going to permit her to answer the last question. Was there an overlap when one shift would come in, would other nurses still be there?
THE WITNESS: Yes.
THE COURT: All right.

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MR. HOWARD: No further questions.
THE COURT: Mr. Wagner?
MR. WAGNER: We have no further questions, Your Honor.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: Nothing, Your Honor.
THE COURT: Thank you very much, ma'am. You may step down.
Call your next.
MR. HOWARD: Your Honor, I think

you told us the other day -- I forgot the lunch break.
THE COURT: We're going to break around 1:30. So call your next.
MR. HOWARD: Judge, could we have just a couple minutes? We're going to introduce the employment records and tax returns. We've got to get those.
THE COURT: Go ahead.
The jury has indicated they would like a break. We will break for five minutes.
(Standard admonition)
(A brief recess was taken.)
MR. CASSELL: All rise.
THE COURT: All right. Be seated. Jury is back in its entirety back with the alternates.
Call your next, Mr. Howard.
MR. HOWARD: Your Honor, at this time the Plaintiffs would offer into evidence the certification of certified employment records being Plaintiffs' Exhibits 21-1, 21-2, 21-3, 21-4, 21-5, 21-6, 21-7, 21-8, 21-9, 21-10, 21-11, 21-12, 21-13, 21-14, 21-15, 21-16, 21-17, 21-18,

21-19, 21-20, 21-21, 21-22, 21-23, 21-24, 21-25, 21-26, 21-27, 21-28, 21-29, 21-30, 21-31, 21-32, 21-33, 21-34, 35, 36, 37, 38, 39, 40, 41. 21-43 is the next one. 21-44, 21-45, 21-46, 21-47, 21-48, 21-49, 21-50, 21-51, 21-52, 21-54.
I believe that a couple of those that I skipped over, I believe that one of them was introduced into evidence already.
What the Plaintiffs would like to do, Your Honor, I've prepared a -- Defendants have a set of these as they're presented with copies run for the jury, and with the Court's permission, I would like to give a set of these documents to the jury and then rather than have them sit and try to read through all these, if I could read portions of them or highlight on the monitor certain portions of those. And as I do that, I would tell the jury which exhibit I'm going to refer to and also would give the Defendants an opportunity by telling what exhibit I was going to refer to.
THE COURT: All right. The offer is Exhibits 2-11 through 21-54, excluding 53

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and 42. Any objection, Mr. Wagner? Or Mr. Ohlemeyer?

MR. OHLEMEYER: I have no objection, Your Honor. As a matter of procedure, under Rule 106 there may be portions of these records that I'd like to read and I assume what I'll do when Mr. Howard is done with a specific exhibit, I'll read my portions.

THE COURT: That's fine.

MR. OHLEMEYER: Any objection?

THE COURT: Any objection, Mr. Wagner?

MR. WAGNER: No, Your Honor, with that organization, we have no objection.

THE COURT: Plaintiffs' Exhibits 21-1 through 21-54, excluding 42 and 53 are now admitted.

(Plaintiffs' Exhibit(s) 21-1 through 21-54 excluding 42 and 53 received in evidence.)

THE COURT: Mr. Howard, you may now exhibit what you like of those exhibits. Bailiffs will pass out copies of those for the jury so they can go along with you,

Counselor.

MR. HOWARD: Plaintiffs' Exhibit 21-1. An abstract from the lower portion of that report, "She was a role model for her staff. She was highly respected by her head nurse peer group and nursing administration. She will be remembered with esteem by all who knew her."

MR. OHLEMEYER: Your Honor, very briefly from the same exhibit, "She was timely and accurate in all reporting, counselings and maintaining of information. She served on nursing service committees and was recorder of the Intermediate Quality Management Cluster."

MR. HOWARD: Plaintiffs' Exhibit 21-2, page 1. "She leads, directs, and simplifies professional nursing through both administration and clinical expertise."

Further down: "As a leader in the collaborative efforts of other nursing members, she was successful in the rationalization of the negative impact on the total care picture this proposal would have on the patient."

Further down on the same page: "Her fairness and honesty are hallmarks of her professionalism."

Further down on the page: "She is dedicated to the provision of highest attainable caliber of nursing care."

Go to 21-3. "Mrs. Wiley maintains a role of leadership in her capacity as head nurse."

Further down on the page, "Her peer and

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professional staff relationships are excellent."

MR. OHLEMEYER: From the same exhibit, Your Honor, which is dated August 1, '88 to August 1, '89, "She maintains communication through formal and informal methods. Her oral and written reporting is timely, concise and complete."

MR. HOWARD: 21-4, second page: "She role models one to one family care for her staff as she cares for these terminally ill, non-ambulatory, non-verbal patients. Through her leadership to improve patient care, two high-risk patients were accepted by the Rehabilitation Medical Unit."

Going down to the last sentence in that paragraph, "Under her guidance two troubled employees have chosen the Employee Assistance Program and an improvement in their job performance resulted."

Last sentence, "She is truly an asset to this VAMC." Date, 6-20-88.

MR. OHLEMEYER: In that same exhibit, Your Honor, "Through her leadership to improve patient care, two high-risk patients were accepted by the Medical Rehabilitation Medical Unit. She continues to lead monthly staff meetings with all tours. She chaired the InterRater Reliability Group for evaluators in immediate care. Mrs. Wiley attended a RMEC offering, "The Head Nurse as Manager," and has applied the principles learned in her decision making.

"She is a member of NOVA, and continues a mentor relationship with lower grade and less experienced."

MR. HOWARD: 21-5, second page. Fourth line down, "She collaborates with other health professionals to assure quality

care for the patients at this VAMC, e.g., initiated and led multipledisciplinary team meetings to re-evaluate a patient's care when the patient's family was unwilling to accept the lack of improvement in the patient."

Going down in the same page: "As a result, the staff-family relationship improved. Her nursing practice is characterized by leadership in improving nursing care."

MR. OHLEMEYER: From the same exhibit, Your Honor, "Sound judgment is utilized as new challenges arise." For example, "Met the challenge of planning quality care for a patient with AIDS. Assisted the staff in coping with the fear and apprehension, provided in-services and led them to develop a detailed plan of care. Feelings were openly expressed, accepted and employees supported by this head nurse."

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MR. WAGNER: Just a point of clarification, too, Judge, I believe what Mr. Howard was reading was not displayed on the screen. What's displayed on the

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screen --

MR. HOWARD: This is all new high tech to me, Judge.

MR. WAGNER: Any new break area was identified which is larger and better ventilated is what was displayed on the screen.

MR. HOWARD: I don't have anything marked. Can we go on to -- are you done with 21-5?

MR. OHLEMEYER: No. I have one other thing. On the same exhibit, Your Honor, "Correspondence and reporting are timely and accurate, i.e., unit problems, patient and staff concerns and requested information are consistently reported. Staff morale was greatly improved as Mrs. Wiley solved the problem created by adding the new telephone system to remove a large portion of the break room. A new break room was identified, which is larger and better ventilated. The application of the principles and learning tools provided in, RMEC seminar at Danville Va has enhanced her ability to cope with the challenges inherent

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to head nurses.

MR. HOWARD: Let's try 21-6. Second page. "With families to comfort and educate." Going further down on the page: "Has demonstrated leadership in professional practice as a staff nurse and as acting head nurse, i.e., establish cooperation from all staff to maintain continuity of care, for a diabetic, obese patient with a stasis leg ulcer facing amputation; thus resulting in improvement of the ulcer. Is an effective role model in the care of 48 intermediate medical patients who are primarily non-verbal." That's dated 6-10 of '86.

Going back up, which is not highlighted, to the top of that page, it says, "During the first six months of the rating period Mildred Wiley served as a staff nurse on 16AB, and during the last six months, she served as Acting Head Nurse for 16AB."

MR. OHLEMEYER: The date 6-10-86. Continuing, "She consistently demonstrates the ability to work effectively with other nursing personnel, as team leader and as

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acting head nurse with families to comfort and educate, and with other services to maintain a smooth functioning unit which meets patients' holistic needs."

MR. HOWARD: 21-7, page 2.

MR. OHLEMEYER: I apologize,

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Mr. Howard. On the next page of that same exhibit, Your Honor, "Serves as a member of the LPN Standards Board, was Safety Coordinator as a staff nurse. Attended the Supervisory Training Course, is a member of NOVA. It is expected that Mrs. Wiley will continue to develop administratively as she demonstrates potential for greater responsibilities."

MR. HOWARD: 21-7. Page 2. "Has demonstrated leadership in professional nursing practice by functioning as charge nurse in the absence of the head nurse while continuing to function as team leader to a group of patients and personnel; also, after noting diminished response to medications in a patient with Parkinson's Disease, researched literature on medication and then collaborated with the ward physician

presenting the findings. The patient's drug therapy was changed, resulting in such improved functioning that the patient was able to feed himself."

Going down to the bottom below the date of 7-2-85. "This nurse provides outstanding professional care for the unit."

MR. OHLEMEYER: From the same exhibit, Your Honor, Plaintiffs' Exhibit 21-7, "Has demonstrated the ability to work effectively with others as team leader working with supportive personnel.

Has demonstrated the ability to initiate and lead groups by initiating and leading a nurse support group for three months, then continuing to lend guidance and support to the group as other nurses assumed the leadership role.

"Has demonstrated the ability to collaborate with other health professionals by establishing approaches and initiating plans of care in conjunction with the multidisciplinary treatment team.

"As has been outlined by example throughout this proficiency, demonstrates

the ability to identify, analyze, and resolve patient care problems resulting in significant improvement in nursing care to individual patients.

"Has functioned as a consultant to many other nurses who have been new to the unit, sharing knowledge, skills, and abilities to accurately assess and skillfully care for the debilitated, geriatric patients.

Has developed a mentor relationship with an Associate Grade nurse, guiding her and setting VA career goals, professional goals and personal goals, also continues a mentor relationship with a nurse outside the VA.

"Serves as a member of the Nurse Professional Standards Board, twice

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participating as a mock board member during two workshops, quote, Pattern for Advancement, closed quote. Serves as Fire and Safety inservice coordinator on the unit."

MR. HOWARD: Maybe I misheard him or he misspoke. You didn't say member of the union, did you? I thought you said

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member of the union.

MR. OHLEMEYER: Unit.

MR. HOWARD: 21-8. Second page. Paragraph from the bottom -- the second paragraph from the bottom: "She also shares with the unit staff through team conferences, direct patient care, and inservices." Dated August 27, 1984.

MR. OHLEMEYER: Very briefly, Your Honor. From the same exhibit, "She has attended several workshops and in-services appropriate to this unit, gaining insight into current concepts and findings. She has shared this information with all staff by taping for all shifts, i.e., Writing Patient Behavior Goals, and by bringing materials as well as listings of videotapes she has seen and felt beneficial to the center (Decubitus Care, Ball State University presentation.) This information was shared with Nursing Education."

MR. HOWARD: Going to 21-9, Plaintiffs' Exhibit 21-9, second page, beginning of the second to the last paragraph, "She has not used any unscheduled

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leave in the last year. She is aware of staffing problems and often volunteers to cover emergency staffing needs before asked."

MR. OHLEMEYER: Am I correct, Mr. Howard, this is the June 30, 1983?

"She assumes the responsibility for initiating new programs and is thorough carrying them out adhering to VA policy. She uses her own initiative in reading the policy, gathering the necessary forms and instructing the personnel to keep them current and informed and to gain their cooperation."

Further on down: "She actively participates in trying to implement new methods, policies and equipment."

Further down: "She has served on several VA committees and presently is serving on the NPSB. She has served as a preceptor and by example is a good role model for new personnel. She strives to keep herself current and informed on nursing trends and VA policies by subscribing to RN journals and attending at in-services."

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MR. HOWARD: Plaintiffs' Exhibit 21-10. Second page. The last paragraph,

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last few sentences, starting about the middle of the paragraph. "One case involved a patient who came to 16A following a 'successful' cardiac resuscitation. The patient was unresponsive and required feeding through a levine tube. Under Mrs. Wiley's guidance, the staff prepared a nursing care plan with the goals of returning the patient to eating and helping to transfer when getting up. The patient responded so well that soon he was feeding himself, then began ambulating and has since been discharged to his home to be with his family."

MR. OHLEMEYER: This is Plaintiffs' Exhibit 21-10, Your Honor, dated June 30, 1982. "Mrs. Wiley's major area of assignment has been as charge nurse on 16A. This is the unit on Building 16 that is used to care for the most acute patients. This unit is also the one most involved in communications with other areas. Using her experience and expertise, Mrs. Wiley is able

to solve many minor problems and conflicts at the unit level, therefore preventing major difficulties from arising. Even during periods of stress when the building is very busy or on days when the staff is disturbed over minor conflicts, Mrs. Wiley remains calm and efficient. In emergency situations, she is able to function effectively and productively.

"Mrs. Wiley's working relationship with all staff on the building is one of mutual regard and understanding. She is very willing to listen to others and they, in turn, are very willing to help her carry out her plan of action."

The last sentence on this evaluation, Your Honor, is "Mrs. Wiley is a major factor in the smooth-operating, cooperative atmosphere that exists on Building 16."

MR. HOWARD: Plaintiffs' Exhibit 21-12, page 2. Dated June 27, 1980. First part of the first sentence, "Mrs. Wiley's integrity is above reproach."

MR. OHLEMEYER: "She is an excellent role model for all nursing

personnel in Building 16.

"Though the 23 patients on that floor are total care, no decubiti have resulted since their arrival on 16A eight months ago. Not only does she identify problem areas early herself, but encourages the staff to be alert to subtle changes in the patients' physical, emotional or behavioral needs.

"She continually looks for better ways of doing things but never for personal recognition. In fact, she's quite embarrassed when someone praises her. Her written communication skills also rate very

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high. She records all pertinent information in each patients' chart in a very acceptable and concise manner, thus increasing the flow of clear information between shifts.

MR. HOWARD: Plaintiffs' Exhibit 21-13. Second page dated 6-7-79. First part of the top first sentence, "Mrs. Wiley is honest, dependable, soft-spoken, quick to notice changes in patients' conditions or behavior and readily reports her observations to me."

MR. OHLEMEYER: Same exhibit, Your

Honor. "Her communications are outstanding.

"Starting last January, it became necessary for Mrs. Wiley to rotate to the evening tour of duty about eight evenings per month. This she readily did without complaint, despite the fact that the PM shift is not desirable for her."

It's signed by Marie Parkinson and it says position, H.N. Bldg. 16. June 7, 1979.

MR. HOWARD: Plaintiffs' Exhibit 21-14.

MR. OHLEMEYER: Your Honor, dated July 18, 1978, signed by Jane C. McCuan, head nurse, "Mrs. Wiley has performed as a staff nurse on Building 16 during the past year. She has been responsible for planning the nursing care of 19 patients who have a variety of diagnoses and challenging nursing problems." She also -- I'm sorry. "She assigns and directs four to five personnel on a daily basis and works closely with them in following the intent of the nursing care plans for each patient.

"She also has rotated frequently to the evening tour of duty where she is

responsible for 85 patients and six personnel on Building 16 while providing RN coverage for Building 15 which involves 40 patients and 3-4 personnel. She shows good judgment in decision making, is calm and effective in emergency situations and is always dependable in carrying out assignments and reporting for duty as scheduled.

"She keeps abreast of new nursing trends by attending workshops wherever possible and reading current periodicals and nursing journals. She has the ability to advance professionally and administratively and I consider her a real asset to our staff."

MR. HOWARD: Plaintiffs' Exhibit 21-15 dated 7-18-77, second page beginning second line down at the end of that line, "She plans, implements, and evaluates the nursing care of intermediate-medical patients and some of the most difficult behavioral problems in the hospital."

Going further down on that page, "is

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dependable and extremely fair and honest in

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her approach in dealings with the staff personnel, patients, and relatives."

MR. OHLEMEYER: From the same exhibit, Your Honor, dated July 18, 1977, "Mrs. Wiley has been assigned primarily to 16A, which has the capacity of 19 patients. She is innovative in planning group activities for patients on the ward and outside in the yard. She has been instrumental in arranging for some occupational therapy being carried out on the ward for patients who are unable to go to the clinic. She is willing, and does rotate to other tours of duty as needed.

"Mrs. Wiley is astute in judging performance and evaluating personnel who work with her and is able to deal with them in such a way that she gets the best performance from them.

"Mrs. Wiley keeps abreast of new trends in nursing by attending workshops, reading current publications, and attending in-service programs. She has always been willing to share information with the staff.

"She is dependable and extremely fair

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and honest in her approach in dealings with the staff personnel, patients, and relatives.

"Mrs. Wiley is a real asset to our staff." Signed again by Jane McCuan, position, head nurse.

MR. HOWARD: Plaintiffs' Exhibit 21-16, second page next to the bottom line, "She is a very conscientious and dedicated nurse."

MR. OHLEMEYER: From the same exhibit, Your Honor, "Mrs. Wiley continues to perform at a high level. She plans and organizes her work well in the patient care on 16A. She has been selected as building Safety Coordinator for Building 16 and has done a good job in her inspection and in-service. She works well with other disciplines and is well liked by patients and personnel."

MR. HOWARD: Plaintiffs' Exhibit 21-17. Second page, first sentence, "Mrs. Wiley is a very conscientious, dependable, loyal employee." Middle of that paragraph, "She and her staff planned a wedding and

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took charge of the reception for a patient's daughter."

MR. OHLEMEYER: From the same exhibit, Your Honor, "Mrs. Wiley has been acting head nurse on several occasions and follows through making decisions when indicated. She has the responsibility of being 'in charge' of 16A and the ward runs quite effectively. She does on the spot

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teaching and uses every opportunity to expand her personnel's knowledge. She works well with other services to coordinate patients' activities. Mrs. Wiley is a very dedicated nurse and a great asset to our nursing team. I wish to retain her on B.16." Signed by Linda Caron, position, head nurse, July 2, 1975.

MR. HOWARD: Plaintiffs' Exhibit 21-18. Second page, last sentence. "She is well liked by her co-workers and is an asset to our nursing team." Dated July 5, 1974.

MR. OHLEMEYER: Signed by Linda Caron, position, head nurse. "Mrs. Wiley has been under my supervision for about one year now. In that year she has supported

new programs or ideas we have tried. She is quick to note and report change in patients' conditions. She reacts quickly and efficiently in emergencies. She is a most professional acting nurse. She has adjusted quickly to hospital nursing after being out of it for some time. Mrs. Wiley is doing counselings as indicated on personnel under her supervision. She does on the spot teaching and in-service. She is well liked by her co-workers and is an asset to our nursing team."

MR. HOWARD: Plaintiffs' Exhibit 21-22 numbered paragraph 2 about midway through. She is -- I thought they were running an advertisement there, Judge.

21-22, middle of the second numbered paragraph. "She is outstanding in her loyalty and support to the mission of nursing service and hospital medical program. For example, when we had a 25-year old acute psychiatric patient admitted under court order against our director, in a maximum security situation, she displayed such concern, integrity, and interest in

helping plan the most therapeutic treatment program possible under the existing circumstances. The chief of psychiatry service at that time stated that the reason the patient became well enough for discharge was due to positive personal relationships he made while on Building 16A."

In paragraph No. 3, the last sentence, "Under her leadership several of the patients have shown great improvements."

Paragraph 5. "Mrs. Wiley recognizes the importance of family involvement in patient care. She uses a good approach with patients and families readily gaining their respect and confidence."

That's dated November 17, 1975, to Nurse Professional Standards Board from head nurse, Building 16.

MR. OHLEMEYER: In paragraph 7 of that exhibit, Your Honor, reads, "Mrs. Wiley

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does an outstanding job as leader of her team on 16A. Some of her nursing assistants have been here several years and are somewhat hesitant to initiate new programs. She is able to implement these changes and

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gain the respect of the personnel with whom she works."

MR. HOWARD: Plaintiffs' Exhibit 21-45. Preemployment physical, 7-9-73. Employment physical SSAN: 403-40-7537. Mildred S. Wiley. "This is a healthy chest."

21-52, Mildred S. Wiley, center of the page, 1975, "Annual chest X-ray report, normal chest." W.J. Comeau, M.D.

Plaintiffs' Exhibit 21-50, Mildred E. Wiley, 403-40-7537, date of request, 8-23-79. In the center of the page, "impression: Normal chest."

That's signed by James C. Camarata, M.D.

Plaintiffs' Exhibit 21-51. Mildred E. Wiley, date of request, 9-14-81. Center of the page, "Impression: Normal chest." Signed by or initialed by W.J. Comeau, M.D.

Plaintiffs' Exhibit 21-48, dated 4-7-91, "Employee Education Training and Incentive Awards Record."

THE COURT: How many more do you intend to refer to?

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MR. HOWARD: Judge, I have probably ten more, and then I have several to show on the Elmo and a tax return, so I'll probably be another 10 or 15 minutes.

THE COURT: We'll take the noon break at this point, ladies and gentlemen. Just leave your exhibits on the chair. That will be fine. We'll break until 2:30. They tell me lunch is here ready to eat.

(Standard admonition)

MR. CASSELL: All rise.

THE COURT: Jury is not now present. Mr. Motley?

MR. MOTLEY: Yes, Your Honor. I'd like to raise two issues with Your Honor. One is a witness matter and the other relates to Dr. Roggli. We would like the Court's permission of a lifting of the order that prohibits destructive testing. We wish to do a tissue analysis of what's called an asbestos fiber burden analysis on the tissue of Ms. Wiley and then utilize that in this case since they raised that issue. And I think Your Honor, that it's not anything -- both sides could do those tests from the

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same block. We have obviously no objection to them having their pathologist or even somebody else do so if they so wish. But since they raise this issue of the fiber burden and the ability to do such a test, we

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seek leave of the Court to do it.

The second issue deals with Dr. Julius Richmond who is the former Surgeon General of the United States of America who we had listed by deposition, but we advised him last week we intended to bring him in person to testify, and I believe Mr. Ohlemeyer told me they would have an objection to that. Obviously, I didn't want to fly him all the way out here from Boston if Your Honor is persuaded they're correct. I'm prepared to argue that after lunch or whenever you want to. I just wanted to bring those to your attention.

THE COURT: Is there an objection to that witness, Counselor?

MR. OHLEMEYER: Yes, there is, Your Honor. He's not on their witness list. The transcript of his deposition was contained on the list of 140 depositions the

plaintiffs filed as a supplemental exhibit list, so I never had to make a decision as to whether or if I should depose Dr. Richmond in this case. He was never listed as a witness.

They have a deposition transcript that they have suggested to the Court and to counsel in pretrial filings that they wanted to use in this case. And I assume there will be some objections to portions of that testimony, and I assume there is cross-examination of that testimony that can be played. But at this point I object to bringing a live witness who was known to the plaintiffs' lawyers who was available to the plaintiffs' lawyers at the time they filed their witness list but not included on their witness list.

With respect to the first issue, the asbestos issue, I think, Your Honor, that is even a more egregious request from plaintiffs' counsel. Dr. Roggli has been identified -- there is no dispute in this case that Dr. Roggli has written a textbook on how to do that analysis. There is no

dispute in this case that Dr. Roggli was identified as an expert in this case by the plaintiffs' lawyers as early as February of 1995 when he wrote them his letter describing his opinions in the case. Dr. Kocoshis suggested to Dr. Turner as early as 1993 that that kind of analysis might be helpful in a case like this.

And quite frankly, the plaintiffs have the burden of proof in this case, and they've brought doctors in here and they will bring doctors in here to tell you that they have opinions about the cause of this woman's disease. And if the plaintiffs' lawyers and Dr. Roggli thought that was something that was necessary in order to

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form an opinion about the cause of Mrs. Wiley's disease, they had the time, they had the ability, and they had the opportunity to do it before trial.

So I don't think in the middle of trial, once again at 1:30, now we're on lawyer time, not jury time, the plaintiffs' lawyers are asking you to reopen the evidence and change their case. This is the

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case they have decided to try. They ought to try it. If they don't like the case, or they don't like things that are going on in the case, that's just part of what being a lawyer and preparing a case and putting evidence on requires. But I don't think, Your Honor, there is any reason at this point to open this up to a situation where now they want an expert to do a test, we might want an expert to do a test, and we've got to put evidence on about what the tests mean when they could have done all of this before trial. If they thought it was important, they should have.

MR. MOTLEY: Your Honor, that's an amazing statement by Mr. Ohlemeyer, given the fact that the blocks were lost in this case before Dr. Roggli's test was done, and Your Honor issued an order in 1995 prohibiting, precluding any destructive tissue analysis. We couldn't do that after Your Honor's order. They've chosen to raise that to some kind of occult issue in this case, and I don't think, Your Honor, in the order of fairness in this matter that that

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should be left out there for the jury to speculate about.

With respect to Dr. Richmond, he was listed as a witness. I don't know what a deposition list is other than a witness list. He was unable to testify at this trial. We finally persuaded him to do it. He is not a witness on the issues of any -- let me restate that. He is a percipient witness, Your Honor, on what these cigarette companies did and did not do when he was the Surgeon General of the United States. He is not in here to offer opinions on causation specific to her or anything of that kind. Dr. Richmond was a Surgeon General of the United States. He has been -- it's not a deposition. He misspeaks. It's a trial transcript of an environmental tobacco smoke case where Mr. Ohlemeyer's partner was there. They took a lengthy deposition and Mr. Ohlemeyer's partner cross-examined him in the trial just in the last six months. In the Broin case which was a flight attendants case in Miami. So he has been on our witness list just by reason of the trial

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testimony in the Broin case.

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We were only recently able to persuade him to come to court.

THE COURT: When do you intend to call him, Counsel?

MR. MOTLEY: I think he was intended to, Judge -- I'll find that out during lunch. I was under the impression it was Thursday, but I'll find out for sure.

THE COURT: Tell me again, Counselor, why the wait on the testing.

MR. MOTLEY: Your Honor, I'm going to have to let Mr. Riley or Mr. Patrick, because I don't want to miscite the dates. Can I ask one of them to respond to Your Honor about when the block was lost and all that?

MR. OHLEMEYER: Your Honor, not to interrupt, but let me, in the interest of accuracy, not fairness, say two things about what Mr. Motley just said. The order that you entered that prohibited destructive testing was an order that was requested by the plaintiffs. There has been destructive testing in this case, and it has been by the

agreement of the parties. With Dr. Cagle, they asked us, there is an order that prevents us from doing this, do you have an objection to it? We said we have an objection unless you do this, this, and this. And they did that. And we didn't involve the Court in that because we worked it out without wasting the time. So that procedure has been in place since day 1, and it was utilized by these lawyers.

The second point, in accuracy or fairness, is Julius Richmond is not on their witness list. I defy them to show you a witness list where his name appears.

THE COURT: Thank you.

MR. MOTLEY: What is a deposition list?

THE COURT: Who is going to speak to the testing?

MR. MOTLEY: I think they're getting the dates together, Your Honor.

MR. PATRICK: Your Honor, Charles Patrick on behalf of the plaintiffs. My understanding is that Dr. Roggli's original report was issued in February of 1995. At

that time, for whatever reason, the tissue blocks had been misplaced by the hospital, and we did not have access to that for him to do the destructive testing or the asbestos fiber analysis.

You entered an order in March of 1995 requiring agreement of the parties in order to do such destructive testing at some point thereafter, and we'll have to establish the date. The tissue blocks were then found and identified. And Mr. Ohlemeyer is correct that we did have agreement of the parties as

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far as Dr. Cagle's experimentation is concerned, but the issue of the asbestos was brought up in the cross-examination of Dr. Roggli and put into issue in this case by the defendants.

So at this point it seems that it would be a proper matter for rebuttal to be able to put Dr. Roggli on and to say -- for him to testify that yes, I've gone to that extra step. I've looked at the tissue for asbestos bodies, did not see any, but I've gone that extra step and I've looked at the tissue under the electron microscope, and I

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can't find levels of asbestos that are anything other than what someone off the street may have as opposed to someone who may be exposed to asbestos beyond background.

THE COURT: You said rebuttal. Are you telling me you want to recall the doctor in your case in chief?

MR. MOTLEY: Or in rebuttal, Your Honor. We just need to do the test and give them an opportunity to look at the results and take his deposition or have him test it himself, rather than wait until our case is over, and then they would have this timeliness issue they've raised.

MR. OHLEMEYER: May I speak to that? It's not proper rebuttal. Just because he gets cross-examined and just because we can point out there are things he might have considered or considered and ruled out in forming an opinion doesn't mean they can bring him back in rebuttal to say now I've considered them.

They've put this man who is an expert who has an opinion about the cause of her

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disease. Whether we can test that opinion on cross-examination doesn't open the door from rebuttal from that same expert. That matter is their case in chief. Rebuttal is new matter. Rebuttal is factual, quite frankly, it's not more opinions from the same witness.

MR. MOTLEY: We're glad to bring him as the last witness in our case in chief.

MR. OHLEMEYER: You brought him once and we cross-examined him and it took a day and a half. If you don't like his answers, you've got to live with them.

THE COURT: I want to tell everybody this one time and one time only. There will be no more conversation among the lawyers. If you have a comment, make it to me.

MR. OHLEMEYER: I apologize, Your Honor.

THE COURT: Mr. Wagner.

MR. WAGNER: This is a calm

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comment. We've been sitting here in this courtroom now for several days, and there is

hardly a day that has ever gone by that we haven't been and the Court hasn't been approached to do something that I've never seen before. I've never seen lawyers in the middle of a case want to do more discovery. I've never seen lawyers in the middle of a case want to do testing that would distract us all from the trial of this case.

I would respectfully like to suggest that we need to try this case, we need to try it as it was prepared and presented before the first day of trial in accordance with your order, discovery orders, and get on with the trial of this case. If we don't, Judge, I'm going to sell my March 15th vacation tickets.

MR. MOTLEY: We have no objection if Mr. Wagner wants to leave on March 15th if we're not through with trial.

THE COURT: All right. At this point my thought is to deny the request for destructive testing. However, I don't see a problem with calling the Surgeon General in as a live witness. I will direct that plaintiffs make him available for

consultation with Counsel at least for an hour prior to his testimony.

We'll break for 45 minutes, Counsel.

(The hearing was recessed for lunch.)

MR. CASSELL: All rise.

THE COURT: Be seated. Jury back in its entirety together with the alternates.

We are reviewing certain exhibits, Mr. Howard, you may continue.

MR. HOWARD: Good afternoon.

Your Honor, that concludes the exhibits that were in the handout, but I'll have some more here, and Plaintiffs would offer Plaintiffs' Exhibit 21-42. That is a copy, Your Honor, of this and we ask permission of the Court to substitute that for this. Show this to the jury.

THE COURT: Any objection to 21-42?

MR. OHLEMEYER: No, Your Honor.

THE COURT: All right. 21-42 will be admitted.

(Plaintiffs' Exhibit(s) 21-42 received in evidence.)

THE COURT: All right, Mr. Howard.

MR. HOWARD: Your Honor, Plaintiffs would now offer into evidence Plaintiffs' Exhibits 17-2 through 17-8, and I have the originals. We would request permission of the Court to offer substitutes rather than the original of the documents.

MR. OHLEMEYER: No objection, Your Honor.

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THE COURT: Plaintiffs' Exhibits 17-2 through 17-8 inclusive will be admitted. Copies may be substituted.

(Plaintiffs' Exhibit(s) 17-2 through 17-8 received in evidence.)

MR. HOWARD: We would like to show these on the monitor.

THE COURT: All right.

MR. HOWARD: For 17-2, 17-3, 17-4, 17-5, 17-6, 17-7, and 17-8.

Plaintiffs would now offer into evidence Plaintiffs' Exhibits 26-1988F, 26-1989F, and 26-1990F.

MR. OHLEMEYER: No objection, Your Honor.

THE COURT: 26-1988F, 26-1989F, and 26-1990F will be admitted.

(Plaintiffs' Exhibit(s) 26-1988F, 26-1989F, 26-1990F received in evidence.)

MR. HOWARD: Thank you. Your Honor, we have copies of those for each of the jurors, and then I will highlight a portion of that on the monitor.

THE COURT: We'll use the same procedure in case defense wants to highlight anything.

MR. HOWARD: Plaintiffs' Exhibit 26-1988F, page 1, Philip E. and Mildred E. Wiley, 1988 tax return, line 7, wages, salary, tips, $54,720. Going to the last page, Form W-2 wage and tax statement, Mildred E. Wiley, $35,375, 1988.

Plaintiffs' Exhibit 26-1989F, Philip E. Wiley, Mildred E. Wiley, 1040 U.S. Individual Income Tax Return, 1989, line 7, $57,527. Last page, W-2 wage and tax statement, Mildred E. Wiley, 1989, $38,264.86.

Plaintiffs' Exhibit 26-1990F, 1040 U.S. Individual Income Tax Return 1990, Philip E. and Mildred E. Wiley, line 7, $60,017. Last page, Form W-2 wage and tax statement,

Mildred E. Wiley, $38,531.90.

Your Honor, that's all of the exhibits. I don't know if the Court wants to allow the jurors more time to look through the documents or what, but that's all we have to present at this time.

THE COURT: Just hand them down then if you're finished. Bailiff will pick them up.

Call your next, Mr. Howard.

MR. CROSS: If the Court please, I will conduct the direct examination of the next witness.

THE COURT: All right, Mr. Cross.

MR. CROSS: Mrs. Betty Hughes. I'll ask the Court's indulgence while we bring her from the other room.

THE COURT: Sure. Would you raise your right hand.

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PLAINTIFFS' WITNESS, BETTY HUGHES, SWORN

THE COURT: Would you have a seat right there, please. Would you tell the jury your name, ma'am?

THE WITNESS: Betty Hughes.

THE COURT: Spell your last name.

1838

THE WITNESS: H-U-G-H-E-S.

THE COURT: Thank you. Mr. Cross.

MR. CROSS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CROSS:

Q Mrs. Hughes, where do you live?

A In the country, actually, between [DELETED]

Q And that's in [DELETED]?

A Yes, it is.

Q And who lives with you there?

A My husband, Rex.

Q Are you employed at this time?

A No, I'm retired. I take it back. I do answer the phone for my husband's business. He does have a little business, so I answer the phone.

Q Okay. Let me ask you a question, and I'm going to remind you that you're under oath so you have to answer truthfully. How old are you?

A I'm 71.

Q When were you born?

A January 30, 1927.

Q Now, you have -- you do -- you perform the

1839

service of answering for your husband's business?

A Yes, I do.

Q How old is your husband?

A 74.

Q What is his name?

A Rex.

Q When were you and Rex married?

A In 1985.

Q 1985?

A I'm sorry. 1981.

Q Okay. Are you a little nervous up there?

A Naturally, a little bit.

Q All right. Well, you just take deep breaths and try to talk to the jury so they can hear what you have to tell them today.

A All right.

Q Now, prior to your answering the telephone for your husband's business, did you have a career or profession?

A You mean since I retired?

Q No, since before that. Earlier in your life, did you have a career?

A Before I went to the hospital?

Q Before you retired.

1840

A Before I retired, yes, I was a nurse at the Marion VA Hospital.

Q How many years were you a nurse at the --

A I was there 30 years.

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Q Let me ask you some questions about that. Let's go back to, where were you born and raised?
A In [DELETED].
Q So you're a lifelong resident of [DELETED]

A Except when I was in nurse's training.
Q Okay. When did you go to nurse's training?
A In 1945.
Q And how long were you in training to be a nurse?
A I was in the three-year diploma program from 1945 to 1948 and then to Indiana University for my bachelor's degree, I think I graduated in 1962.
Q So when did you become a licensed nurse?
A In 1948.
Q And that training, received -- have you heard the phrase, capping of a nurse?
A Yes. I went through it.
Q Can you tell the jury what that involves.

A This is a bright spot in a nurse's, student nurse's life. We have satisfactorily, at least at my hospital, it was six months training, and then we have passed the initial studies so we get our caps. We, before that, did not have a cap on our head, so the nurse's cap is placed on our head at that time.
Q And does that make you an LPN or an RN?
A No, still a student nurse.
Q Okay. What's the next step in a nurse's training and education after she receives her cap?
A The day of graduation.
Q Okay. And what happens after that?
A Well, then you take a state board exam and hopefully you pass it.
Q Okay. And if you do pass it, to what does that entitle you?
A Then you're entitled to your RN.
Q Okay. And did you take such an exam, Mrs. Hughes?
A Yes, I did, in Illinois.
Q So you were licensed as a registered nurse in Illinois?

A Yes.
Q Approximately when was that?
A 1948.
Q And where did you go to work after you became a registered nurse?
A My first job was in the hospital where I trained at Michael Reese.
Q How long were you there?
A I think possibly about four months.
Q And could you then tell the jury where you went and where you worked and the kinds of things you did up until the time you went to the Marion VA Hospital.
A Okay. At that hospital, I worked on a circumcision and tonsillectomy ward. I

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would come in the morning and take care of their children that had their tonsils out and circumcisions. Then when they went home, I made up the beds and made them ready for the next day.

Then my next job was working in a doctor's office, and I worked there for six years. Family practitioner.

Q So you -- where was the doctor's office, the family practitioner you worked for?

1843

A In Fairmount, Indiana.
Q Okay. And what was the name of that doctor?
A Actually I worked for two. I worked for one for six weeks, Dr. Belshaw, then he moved from Fairmount, and I worked for Dr. Dale King.
Q And then you went from there to the Veteran's Administration?
A Yes, I did.
Q Why did you take a job at the Veteran's Administration from the one that you had with the doctors in Fairmount?
A I felt like it would be a good place to use my nursing skills.
Q And what year was it exactly that you went to work at the Veteran's Administration?
A When I went to work?
Q Yes. What year was that?
A 1955.
Q Now, I want to go back in time to the time that you were capped. Can you tell the jury what the Nightingale pledge is?
A It's a pledge where we say that we will be ethical in our nursing, that we will consider the patient and will not do

1844

anything to hurt him but do everything to try to help him that we can.
Q Do the patients -- I'm sorry. Do the nursing students have to take this pledge at any point in time in their education?
A The nursing assistants?
Q Yes.
A No.
Q And when did you first learn of the Nightingale pledge?
A During my nurse's training.
Q And did you take that pledge?
A Yes, I did, at capping time.
Q Do you subscribe to that pledge today?
A Yes, I do.

MR. CROSS: May I approach the bailiff, Your Honor?

THE COURT: Sure.

Q Mrs. Hughes, I'll hand you a document that's been marked for identification as Plaintiffs' Exhibit 22. And could I ask you to identify for the Court and the jury what is contained on that particular document?
A That is a copy of the Florence Nightingale pledge.

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Q Who was Florence Nightingale?
A She was the one that was -- one of the beginning nurses.
MR. CROSS: Your Honor, at this time the plaintiffs would like to move into evidence Plaintiffs' Exhibit 22.
MR. OHLEMEYER: No objection, Your Honor.
THE COURT: 22 will be admitted.
(Plaintiffs' Exhibit(s) 22 received in evidence.)
MR. CROSS: May I ask the Court for permission to ask Mrs. Hughes to read that document to the jury.
THE COURT: Would you read that to the jury, please. "I solemnly pledge myself before God, and in the presence of this assembly, to pass my life in purity and to practice my profession faithfully. I will abstain from whatever is deleterious and mischievous, and will not take or knowingly administer any harmful drug. I will do all in my power to maintain and elevate the standard of my profession, and will hold in confidence all personal matters committed to

my keeping and all my family affairs coming to my knowledge in the practice of my profession. With loyalty I will endeavor to aid the physician in his work, and devote myself to the welfare of those committed to my care."
Q And did you subscribe to that pledge at the time of your capping ceremony?
A Yes, I did.
Q And during your 30 years as an active nurse, did you follow that pledge to the best of your abilities?
A Yes, I did.
Q Now, you have been active with a particular group -- in fact, you attained an office with that group at one point in time; isn't that true?
A Yes.
Q Can you tell the jury the name of that group you've been associated with?
A You're speaking about the American War Mothers.
Q Yes. What exactly is the American War Mothers?
A All the members of this organization

currently have children or have had children in the military.
Q All right.
A We do a lot of work with the veterans.
Q What kind of work do you do with the veterans?
A We work both in the community and in hospitals, volunteering with them mainly, and we do help them sometimes with money, things that they need.
Q Is this a local group or a regional group?

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A It's a national group.
Q And how long have you been associated with this particular group?
A Since the early '60s I believe.
Q And did you, in fact, attain an office in this group?
A I was the national president for two years.
Q And did you attain any recognition for your office holding as president of the National War Mothers?
A Well, I got a Who's Who, got the plaque on my birthday this year.
Q You've been mentioned in Who's Who?
A Yes.

1848

Q Okay. Now, since -- do you still -- you retired from the VA in what year, Mrs. Hughes?
A 1985.
Q And have you continued to have any association with the Veteran's Administration Hospital in Marion since your time of your retirement?
A Yes, with the American War Mothers, I usually volunteer about once a month out there.
Q Now, from 1955 when you first went to the VA Hospital to 1985 when you retired, was your term of employment with that hospital continuous?
A Yes, it was.
Q So you never took any year-long leave of absences to go anywhere?
A No. No.
Q Let's go back to 1955 when you first assumed employment in the Veteran's Administration. What was the -- you were an RN at that time; correct?
A Yes, I was.
Q And you had not yet had a bachelor's degree.

1849

I think you said you got your bachelor's degree from Indiana in 1962?
A I believe it was '62.
Q Why, if you already had a job as an RN in a hospital, government hospital, why would you go take additional education?
A Well, I wanted to keep current, for one thing. And also, we got a better salary. We were in line for better positions if we had more degrees.
Q How were you able to complete a bachelor's degree at Indiana University if you were maintaining a full-time job at the Veteran's Administration Hospital?
A I went evenings and on my days off.
Q Where did you go?
A Indiana University.
Q At the Bloomington campus?
A At Bloomington, and a few classes in Marion and a few classes in Indianapolis and Kokomo.
Q So you would be driving to all these cities

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at night?
A That's right.
Q After the end of your day?

1850

A That's right.
Q Now, in 1955, when you first went to the Veteran's Administration Hospital as a fairly new registered nurse, what was your first job? What did they make you do the first time you went there?
A I think the first building I was on, I was with more or less geriatric patients.
Q And what did you do for them? What kinds of things did you do?
MR. OHLEMEYER: Excuse me, Your Honor, I don't mean to interrupt, but --
MR. CROSS: Then don't.
MR. OHLEMEYER: Excuse me, Mr. Cross. I think this is irrelevant, 1955.
MR. CROSS: I'm building up the foundation of this woman's knowledge and expertise as a nurse to lay a foundation for what she's going to testify to as to what was common to all nurses during the relevant years.
MR. OHLEMEYER: This witness is a fact witness and a percipient fact witness.
THE COURT: All right. I'll hear a

1851

little more of it, Counselor. Go ahead.
A I'm sorry, what was the question?
Q What kinds of things did you do for these people in the geriatric wards?
A I tried to motivate them to do as much for themselves as they could. They were mainly psychiatric and geriatric with some medical problems, and we worked hard to try to motivate them to want to help themselves in self-care.
Q How long did you work in the geriatric wards of the hospital?
A Possibly altogether, around 20 years.
Q So you went back to those wards from different times?
A Yes, I did.
Q Did there come a time, Mrs. Hughes, when you went to work in Building 16 of the Veteran's Hospital?
A Yes.
Q When was that?
A I believe in 1957 I went over there first.
Q And in 1957, what kind of a ward was the Building 16?
A At that time, it was an acute psychiatric

1852

ward. We had patients of various ages, and it was the most acutely disturbed psychiatric patients.
Q And what do you mean by acutely disturbed?
A I guess maybe nowadays they would be called hyperactive, and we had suicidal patients and various classifications.

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Q And needless to say, these people were all veterans, were they not?
A Yes, they were.
Q What was your particular job in Building 16, which you first went there about 1957?
A I was there a short time as a staff nurse. Then I became head nurse there.
Q Okay. Now, where was your office -- you were -- let me ask you this: When did you become head nurse, if you can recall?
A I think probably about 1958.
Q And what were your responsibilities as head nurse in Building 16?
A It was my responsibility to see that all the nursing service people, which included nursing assistants, LPNs and RNs, motivated the patients to help themselves as much as possible. But at that time, we did not know

1853

about secondhand smoke.

MR. OHLEMEYER: Excuse me, Your Honor. Move to strike the answer as non-responsive. I'd ask the Court to reconsider the objection to the relevance of this witness as a fact witness, and this time period has nothing to do with this lawsuit.

THE COURT: Motion to strike will be granted. The jury will disregard everything after the witness said, "at that time we did not know about," jury will disregard that. Counselor, let's bring it up to the relevant period here.

Now, ma'am, I just want you to answer his questions.

Q You all right?
A I'm fine.

MR. CROSS: Okay. If the Court please, there are a couple more questions pertaining to this time period that I do think have some significant relevance with respect to her position as head nurse.

THE COURT: All right. Go ahead, I'll hear them.

1854

MR. CROSS: Thank you.

Q Where was your office as head nurse?
A It was in the front of the building, and the day room where the patients spent most of their day was at the other end of the building.
Q Later on that, the location of the head nurse office was moved, was it not?
A Yes, it was.
Q Where was it changed to?
A It was changed to right at the edge of the patient day room.
Q Now, when you were -- after you finished being the -- strike that.

When did your time in Building 16 exclusively as the head nurse terminate? When did that come about?

A About 1959.

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Q And what did you do after that, at the VA Hospital?
A I went to another building as head nurse, and then later on I went to nursing education, and then after I came back as a staff nurse.
Q Okay. So when did you go into nursing

1855

education?
A In 1962.
Q And from -- and how many years did you serve in the area of nursing education?
A Fifteen years.
Q And during -- so that would be 1962 to 1977?
A Yes.
Q During that time period, 1962 to 1977, did you have occasion to visit Building 16?
A Yes, I did. I had -- excuse me.
Q How frequently would you have reason?
A When I had students there, I usually spent every part of every day that the students were there.
Q Every single day you were in Building 16?
A Yes. Not the full day. I wasn't there the full day. I was there part of the day.
Q I understand, but you did have occasion to be in there from time to time?
A Yes.
Q Did you have occasion to go into any other buildings during that 15-year period?
A I was on every patient building.
Q Every building?
A Yes.

1856

Q All right. And did you have occasion to go to different shifts of the day?
A During the 30 years that I was there, I worked all three tours on every building.
Q All three tours every building?
A Yes. Yes.
Q Drawing, with specific reference from the period that you were in nursing education, 1962 to 1977, then I think you said you went to become a staff nurse after that?
A Yes.
Q Okay. So would that be from 1977 to 1985 you were staff nurse?
A That's correct. That's correct.
Q Did you have occasion during those last eight years at the VA Hospital to travel to different buildings?
A Occasionally, but most of the time I spent on one particular unit at that time.
Q Okay. And did those units change from time to time, different buildings, different shifts, different times?
A Yes. They changed both patients and then the construction of the buildings changed several times during the time I was there.

1857

Q Now, I want to ask you, during the time period that you were there, okay, the time you were involved in nursing education in

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particular, the 15 years when you were travelling all over the VA Hospital, did you have occasion to observe whether there was smoking taking place in the various buildings?

A Yes, I did.

Q Did you have personal knowledge of this?

A Yes, I did.

Q You observed it with your very own eyes?

A Yes, I did.

Q Now, with particular reference to Building 16, was smoking -- during the years 1962 to 1977, when you were in there virtually every day, did you notice that the condition was any different than it was when the time you were head nurse?

MR. OHLEMEYER: Your Honor, object to the question as being leading, argumentative, and the question --

THE COURT: Question is leading. Rephrase that, Counselor.

MR. CROSS: I will be glad to, Your

Honor.

Q Drawing your attention to the time period you were in the nursing education function of the hospital, all right?

A Yes.

Q Those the same years being 1962 to 1977, what did you notice about the prevalence of smoking in Building 16 as it related to the way it was when you were head nurse?

MR. OHLEMEYER: Objection, Your Honor. It lacks relevance during time periods where Mrs. Wiley didn't work at the hospital or wasn't in the building and lacks foundation as to when this witness was in the building with Mrs. Wiley.

MR. CROSS: It establishes --

THE COURT: Overruled. You can answer that question, ma'am.

THE WITNESS: Would you please repeat it?

Q I will try. Mrs. Hughes, during the time that you were involved in the nursing education programs at the Veteran's Administration Hospital, what was -- what can you say about the relationship of the

smoking that you observed during those years versus the time when you were head nurse?

A It was still pretty bad, the smoke in the entire building.

Q And can you tell the jury what it was like during the time you were doing nursing education?

MR. OHLEMEYER: Same objection, Your Honor. The question is --

THE COURT: Objection is noted and overruled. Except make your question more specific. What it was like, what was what like?

MR. CROSS: All right.

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Q How would you describe the amount of smoke that was present in the first floor of Building 16 in the years in the later '70s.
A In the later '70s, there was a lot of smoke all over the building.
Q All over the building?
A All over the building, including the nurse's office.
Q Did the nurses smoke?
A Yes.
Q Patients smoke?

1860

A Yes.
Q Did patients in the day room smoke?
A Yes, they did.
Q Did the smoke ever go away during the day?
A Never.
Q And if you went into an office and closed the door, would the smoke go away then?
A No. It still penetrated.
Q Did you have any air conditioning in your office?
A Not at the time I was head nurse, I don't believe.
Q You did have occasion during those years to see how much smoke there was in other buildings of the VA Hospital; is that correct?
A Yes, I did.
Q How would you describe the extent of the amount, rather, the amount of the smoke that was present in the other buildings of the VA Hospital with that which was in Building 16?
A They were all bad, but 16 was particularly bad, I thought.
Q Based on your observations of the others?
A Yes. Yes.

1861

Q I believe there's been some testimony and some statements made during the course of this trial that a lot of the patients who were in Building 16 were particularly physically disabled. Do you recall that being true?
A That's true.
Q And were there people who were paralyzed in those buildings?
A Yes. We had many post-stroke patients.
Q And did these people smoke?
A Some of them, yes.
Q How could they smoke if they were paralyzed or post-stroke?
A They were assisted.
Q Who assisted them?
A Usually it was nursing service person. Once in a while it would be somebody from another department, but usually nursing service.
Q Did you see this happen with your own eyes?
A Yes. I did. Yes, I did.
Q And could you tell the jury exactly what they would do, how they would assist these people?
A Depended on the ability of the patient to

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help himself, but we might even have to hold the cigarette in his mouth for him.

Q Because of why? Why would you have to do that?

A Because they were unable to do this themselves, to hold the cigarette themselves.

Q What was -- let's go back to the education function that you performed. Beginning in 1962, when you started to become an educator, is that a proper word, educator?

A Nursing instructor is the term they used.

Q Nursing instructor. Who would you be instructing?

A Who would I be instructing?

Q Yes, ma'am.

A Nursing assistants, and I had a basic course for them. And then sometimes we had ongoing education, and I provided orientation programs for LPNs and RNs also, new people.

Q So there were basically three different types of educational programs that you administered?

A Yes. Yes. And we even had various levels of nursing assistants. We had what we

called an advanced class, in addition to their orientation period.

Q What is a nursing assistant as opposed to a registered nurse?

A They don't have an RN or LPN but they do a lot of good work.

Q They just don't have --

A They assist the patients. They give them personal care like bathing, assist them in brushing their teeth, combing their hair, personal hygiene.

Q The nursing assistants would also help in the patients smoking?

A Yes, and they would have activities with them to try to motivate them in addition to the personal care.

Q So you trained nursing assistants, you gave orientation courses to new nurses at the hospital, and you also did continuing education of a sort to these people?

A Yes.

Q What kinds of things would you do in the continuing education courses?

A In the advanced classes, for example, we might teach catheterization, respiratory

things like helping with gastro problems and this type of thing.

Q Now, did you conduct these continuing education courses up until the time that you became the staff nurse in the late '70s?

A Yes, I did.

Q When you -- let me ask you this: Was there anywhere in the Veteran's Administration Hospital where smoking was not permitted?

A In the olden days, I should say when I first

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went out there, smoking was permitted anywhere expect in the patients' bedrooms and in the chapel.

Q Why wasn't smoking permitted in the patients' bedrooms?

A Could have been a hazard. Could have been a fire hazard.

Q So it wasn't concern about whether smoking was --

A No.

Q So was there anytime of the day -- let me ask you that way: What part of the day, while you were involved in nursing education, especially in the late 1970s, would you be in a position not to be

1865

surrounded by secondhand smoke?

MR. OHLEMEYER: Objection, Your Honor, relevance.

MR. CROSS: It's extremely relevant, your Honor. It's probative.

MR. WAGNER: It's also prejudicial to frame questions like "surrounded by secondhand smoke." We need to have more precise time frame as to these questions.

THE COURT: I agree. Make your question more specific.

Q Drawing your attention, again, I'm talking towards the end of your tenure in the nursing education.

A Yes.

Q In particular, that would be the late 1970s. Correct?

A Yes. Until '77.

Q 1977. In 1977, on a typical day, would there be anytime during the course of that day, or tell the jury what, how much of that particular day, would you not be exposed to secondhand smoke?

MR. WAGNER: Your Honor --

A I would be exposed all day long.

1866

MR. WAGNER: Just a moment. First let me make my objection, Your Honor. It's not relevant unless it's somehow connected to what Mrs. Wiley may have been doing or was someplace in the vicinity. All we have is this witness' testimony about what her experiences were, and those are not necessarily germane or connected to Mrs. Wiley's personal experience.

THE COURT: I think that goes to the weight. Overruled.

You can answer -- did you understand the question?

THE WITNESS: I'm not sure at this point.

THE COURT: The question was in the late '70s, was there a time when you, you yourself were not exposed to smoke.

THE WITNESS: That's right. I was exposed the entire day.

Q Again, from the time period that you were at

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the Veteran's Administration Hospital, I'll just take the whole 30 years, was there ever a time that you can recall that Building 16 did not have smoke in it when you were

there?

A Smoke what?

Q Was there ever a time that Building 16 did not have smoke in it when you were there?

MR. OHLEMEYER: Same objection, Your Honor.

A No. It was always there, and we were not aware of secondhand smoke.

Q All right.

THE COURT: Objection is overruled.

Mr. Wagner.

MR. WAGNER: Move the answer go out, Your Honor.

THE COURT: Motion to strike is denied.

Q Now, was there ever -- was there ever a day during the entire time you worked at the Veteran's Administration Hospital, Mrs. Hughes, that you did not -- that you were not exposed to secondhand smoke at all?

MR. OHLEMEYER: Same objection, Your Honor.

THE COURT: I think she answered that question, Counsel.

MR. CROSS: I was going to just

Building 16.

THE COURT: I thought she answered that.

MR. CROSS: Okay. I'll move on.

THE COURT: All right.

Q When you went home at night, when you went home at night, Mrs. Hughes, what, if any, reminders of your day at work did you take home with you?

A I was completely saturated with smoke.

MR. WAGNER: Objection, Your Honor.

THE COURT: Ma'am, let me tell you, when there is an objection, I want you to stop.

THE WITNESS: Oh, I'm sorry.

MR. WAGNER: Objection, your Honor. Again, this is irrelevant as to this woman's experiences that aren't connected up to Mrs. Wiley, and I know where this is going, and I think Your Honor does too, so we object for that reason.

MR. CROSS: May I respond, Your Honor? Your Honor, the evidence is already established that Mrs. Hughes was in the same building that Mrs. Wiley was during the same

period of time; she was exposed to the same secondhand smoke Mrs. Wiley was. I think it's perfectly legitimate, probative to explore those issues.

I might also ask -- inform the Court, Mrs. Hughes has a little difficulty in

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hearing, so she may not be able to hear that there is an objection going on.
THE COURT: I'm going to overrule the last objection. You may answer the last question.
THE WITNESS: Would you repeat it, please?
MR. CROSS: I've lost my train of thought. Do I approach the reporter?
THE COURT: The question was, when you got home from work, during the late '70s, did you have any -- his word -- of the smoke in the building?
A Yes, I did. I could smell it in my hair, through my clothes.
Q And was that true every day until you retired in 1985?
A Yes, it was. From the day I went to the hospital till the day I left.

1870

Q Did you find the secondhand smoke offensive?
MR. WAGNER: Your Honor, objection as to what this witness' reactions were. Now we're really getting far afield, it seems to me.
THE COURT: I agree. Sustained.
Q During the time that you worked there from -- let's take the relevant period 1973 to the time you retired in 1985, did you ever make any complaints to anyone about the condition of smoke in the buildings at the VA Hospital?
A Not really.
Q Why didn't you make any complaints?
MR. WAGNER: Objection, Your Honor.
THE COURT: You can answer that, ma'am. The objection is overruled. You may answer that.
A Okay. I did not know about secondhand smoke at that time, and I needed a job, so I put up with it.
Q Was there any other place in the Veteran's Administration Hospital you could have gone to and not been exposed to secondhand smoke?
MR. WAGNER: Your Honor --

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A No.
MR. CROSS: Just a minute.
MR. WAGNER: Objection. No time; no specific reference.
THE COURT: Fix a time, Counselor.
MR. CROSS: Between the years 1973 to your retirement in 1985.
A No.
THE COURT: All right. Objection is overruled.
Q Do you know of any other hospital that you could have gone to work as a nurse and not been exposed to secondhand smoke during the years 1973 to 1985?
MR. WAGNER: Objection. Objection, Your Honor, irrelevant, no foundation.
THE COURT: The objection is

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sustained. You do not have to answer that.
Q Mrs. Hughes, there has been some testimony from Mr. Wiley in this case that his wife was a member of a safety committee. Are you familiar with the safety committee?
A Yes, I am. I was on it at one time.
Q What is the safety committee?
A This was a committee consisting of people

from different departments of the hospital, and we met to discuss issues that would affect safety. And secondhand smoke was never mentioned in this.
Q What was the --
MR. WAGNER: Your Honor, move the answer go out. I mean --
THE COURT: The last part of her answer regarding secondhand smoke will go out; jury will disregard.
Now, ma'am, all I want you to do is answer his questions. Don't volunteer anything. Just answer what he asks. He asked you what the safety committee was. Now, tell us again what the safety committee was.
A This is a committee that was concerned about safety of the patients and of personnel. And it consisted of members from -- people from different departments were on it.
Q And when approximately were you on the safety committee?
A I think about 19- -- in the late '70s.
Q And did the issue of patients smoking ever come up during the context of the safety

committee meeting?
A No, it didn't.
Q And as a consequence of any of these safety committee meetings, was there ever a change carried out in the policy towards smoking at the Veteran's Administration Hospital?
A It wasn't that I recall.
MR. OHLEMEYER: Objection, Your Honor. Lack of foundation.
MR. MOTLEY: Can we be heard on that?
THE COURT: There's no foundation yet. That objection is sustained.
Q Did you know, Mrs. Wiley?
A Yes, I did.
Q How did you come to know Mrs. Wiley?
A I met her on the ward. I had students there, but I also saw her a few other times other than when I had the students there. Like when I would take information to the building or something for the nurses to have.
Q I think there's been some testimony that Mrs. Wiley began her career at the Veteran's Hospital in 1937 and worked until the time

of her death which was long after you retired. How often during that time span

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would you have had occasion to make her acquaintance or talk to her in any given day?

A When I was in the building with the students, I would have a chance to contact her.

Q And this was the time period which you were talking -- when you were coming to Building 16 every day?

A Yes.

Q So you would have seen -- during the time you were in nursing education, you would have seen Mrs. Wiley every day that she was there?

A Every day that I had students there.

Q And did you become friendly with her?

A Yes, I did.

Q Can you tell the jury what kind of a nurse she was to your observation?

A She was very compassionate, very concerned about the patients and in getting them to do as much for themselves as they could.

Q And when you saw her, would she be sitting

in her office doing paperwork or would she be doing something else?

A Most of the time, when I saw her, she was out with the patients.

Q And what do you mean, out with the patients?

A Out at their chairside or bedside, whatever the case. She was not in the office.

Q How many people -- how many patients approximately were there on the first floor of Building 16 to your observation?

MR. WAGNER: Your Honor, may we have a time?

THE COURT: Fix a time.

MR. CROSS: I'm --

THE COURT: Talking about the late '70s?

MR. CROSS: I am, Your Honor. I'm talking about the entire time from 1973 to 1977 when she was in there every day and then those frequent occasions from 1977 until her retirement when she would have occasion to take papers or whatever and go there. I thought we established that temporal reference.

A You asked the number of patients? I'm

sorry.

Q Yes.

A You asked the number of patients?

Q On the first floor of Building 16.

A I can't tell you offhand. There probably were probably 20 some.

Q Okay. And did you have an impression from the number of, you know, from your daily visits initially and then the regular visits thereafter as to how many of those people were smokers?

A I think probably the majority of them.

Q And did you have an opinion from that time

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period as to how much of the staff would be smoking?
A Probably over half of them.
Q All right. Did that include the nursing assistants?
A Yes, it did.
Q Did that include any of the nurses themselves?
A Yes, it did.
Q Did you smoke?
A No. Never.
Q Have you ever smoked?

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A No.
Q Did the doctors smoke?
A Yes, the doctors did.
Q Do you remember -- let me ask you this question: I omitted to go into previously, you mentioned that even though -- even some of the post-stroke patients and some of the paralyzed patients continued to smoke despite their disabilities. How would they get cigarettes, if you know?
A Somebody would have to give them to them.
Q And do you know how that was accomplished?
A Probably somebody from nursing service would give it to them.
Q And did the nurses ever convey any orders or requests for cigarettes in that regard?
A You mean as to the kind of cigarettes?
Q Yes.
A Yes.
Q And did you personally ever do that? Did you convey a request for a particular brand?
A As the head nurse, I had to see that the order was carried out, yes.
Q And do you have any specific memory as you sit here today what brands had been

1878

requested during your time period?
MR. WAGNER: May we approach?
THE COURT: All right.
(Bench discussion)
THE COURT: All right. The objection to the last question is sustained. Go ahead, Mr. Cross.
MR. CROSS: Thank you, Your Honor.
Q After you retired, I believe you stated in 1985 you continued to do volunteer work through your War Mothers program?
A Yes, I still volunteer.
Q What do you do as a volunteer now at the Veteran's Hospital?
A We usually will have parties with them. The type of parties might vary from month to month.
Q And was that pretty -- was that fairly much the case after 1985?
A Yes.
Q In other words, that's -- you have parties now. Is that what you did in 1980, right after your retirement?
A Yes.

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Q How often does that take you to the
1879
Veteran's Administration Hospital?
A About every month.
Q Once a month?
A Uh-huh.
Q When did the conditions in the buildings insofar as the amount smoked begin to change?
MR. OHLEMEYER: Objection, Your Honor, lack of foundation, specificity.
THE COURT: Make that a little more specific, if you will.
Q All right. After you retired in 1985, you continued to go out to the Veteran's Hospital about once a month?
A Yes.
Q And did there come a time when you were aware that conditions in the building in terms of the amount of smoke that was in the air began to change?
A After I retired, yes. Because now I understand the buildings are all smoke free.
Q And when did that take place; do you know?
A After I retired, so I can't truthfully tell you.
Q When you retired in 1985, did you have any
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knowledge as to any health risks associated with secondhand smoke?
MR. OHLEMEYER: Objection, Your Honor. Relevance, foundation.
MR. CROSS: Your Honor, I established her educational background; she was the person who, in fact, taught continuing education in nursing at the hospital, and she's certainly entitled to know --
THE COURT: She can answer that.
You may answer.
A Would you repeat that again, please?
Q I would be more than happy to.
When you retired from the Veteran's Hospital in 1985, did you have any personal knowledge as to the health risks associated with secondhand smoke?
A No, I was not aware of secondhand smoke as such at that time and the hazards of it.
Q Did you ever have any conversation with Mildred Wiley concerning the health risks associated with secondhand smoke?
A No, not with secondhand smoking.
Q Did she ever make any statements to you on
1881
that subject?
A Not on secondhand smoking.
Q Did you ever receive any bulletins from the Veteran's Administration concerning secondhand smoke or its possible hazards?
A Never.
Q Did you ever receive any bulletins or any information from any other source about those problems?

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A No.
Q Mrs. Hughes, I want to show you --
MR. CROSS: May I approach the witness, Your Honor?
THE COURT: Sure.
Q I want to hand you a photocopy of what's been admitted into evidence as Plaintiffs' Exhibit 21-48.
MR. CROSS: That has been admitted, has it not?
THE COURT: Yes.
MR. CROSS: Thank you.
Q And ask you if you are familiar with the document such as that?
A Yes, I am.
Q Can you tell the jury what that is.

A That shows the training she has had.
Q This is -- what is this document? What is it a list of?
A The education and training that she received.
Q Thank you. That's Mildred Wiley, it refers to?
A Yes. Yes.
Q So this shows the number of -- this is a three-page document, is it not?
A Yes.
Q And can you tell roughly the time period it extends over?
A From 1975 to 1991.
Q To '91?
A Yes.
Q And these are a list of courses, are they not?
A Yes.
Q Would you have conducted any of these courses?
A Not in 1975, I don't believe.
Q Okay. But would you have conducted -- let's see. There's 1975 through '77, there are a few there. Would you have conducted any of

those?
A Let me see. Yes, I probably had the reality orientation.
THE COURT: Say that again.
A Reality orientation.
Q You are referring to --
A The reality orientation workshop.
Q -- the last item on page 3, April 29, 1975?
A Yes.
Q Realty orientation workshop?
A Yeah.
Q You would have conducted that course?
A Yes.
Q In any course that you conducted or was given to you during your time at the Veteran's Administration Hospital, was there ever a mention or presentation made concerning secondhand smoke?
A Never.
Q Do you today, as you sit here today, do you

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have any physical problems as a result of that secondhand smoke?

MR. OHLEMEYER: Objection, Your Honor.

MR. WAGNER: Objection, Your Honor.

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THE COURT: I think I'll sustain that, Counselor.

MR. CROSS: May I have a moment to confer with my colleagues?

THE COURT: Yes, sir.

(A discussion was held off the record.)

MR. CROSS: Thank you, Your Honor.

MR. OHLEMEYER: Your Honor, I object to any question of this fact witness that begins with Mr. Cross writing this word on the board.

MR. CROSS: May I speak?

MR. OHLEMEYER: If he wants to speak, I'd like to speak in sidebar about it.

THE COURT: All right. Come up.

(Bench discussion)

THE COURT: Go ahead, Mr. Cross.

MR. CROSS: Thank you, Your Honor. We've used up a lot of paper so far.

Q Mrs. Hughes, can you see that?

A Yes, I can.

Q I've written a word on there, nitrosamine. Let me ask you --

MR. WAGNER: Nitrosamines.

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MR. CROSS: Nitrosamines. Thank you very much.

Q Are you familiar with that word?

A No, I am not.

Q Have you ever seen that word before today?

A No, I haven't.

Q I'm going to write another word and ask you the same question.

MR. WAGNER: Your Honor, objection. You can see where we're going to go.

MR. CROSS: One more.

THE COURT: One more? All right.

Q I've written the word benzo(a)pyrene on there. Have you ever heard of that?

A Yes, I have.

Q What context have you heard of that?

A In connection with smoking.

Q Do all nurses take that pledge that you read to the jury?

A The Florence Nightingale pledge, yes, we do.

Q And is it your understanding that that pledge requires you to not do anything which would harm a patient?

MR. WAGNER: Your Honor --

A That's right.

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MR. WAGNER: It seems to me it speaks for itself. We don't need the witness to interpret. The pledge speaks for itself.

THE COURT: She read the pledge.

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Sustained.
Q Now, you stated that you indeed follow that pledge during your career.
A Yes, I do.
Q Based on your nursing education and your overall knowledge during the time that you worked at the Veteran's Administration Hospital, in your professional opinion, did you do anything at any time which was harmful to a patient?
A Never, that I can recall.
Q With regard to the same issues, did you ever observe -- did any of your colleague nurses, did they live up to the pledge to the best --
A I feel that they did.
MR. CROSS: Pass the witness, Your Honor.
THE COURT: All right.
Mr. Ohlemeyer?

MR. OHLEMEYER: I'm going to let Mr. -- I've got a couple.
THE COURT: All right.
CROSS-EXAMINATION
BY MR. OHLEMEYER:
Q Good afternoon, Mrs. Hughes.
A Good afternoon.
Q My name is Bill Ohlemeyer. I just have a few questions for you.
Am I correct that you retired in 1985?
A Yes, I did.
Q And before that, you were a nurse.
A Yes.
Q And for a time you were even a head nurse; right?
A Yes.
Q And I hesitate to use the word, but is the head nurse the boss of the nurses?
A I suppose you could use that terminology.
Q And is there a chain of command that --
A Yes.
Q How does that work, with the head nurse?
A The head nurse on the building is the highest level. Then you have your staff nurses, which are RNs and LPNs, which are

licensed practical nurses and nursing assistants.
Q And do the orders essentially come from the head nurse, to the next level, to the next level, to the next level?
A Yes. Yes.
Q And so who is it that tells the nursing assistants what to do?
A Depending on who their team leader is. Usually it's an RN.
Q And then would the head nurse tell the RNs what to do --
A Yes.
Q -- if somebody needs to deal with the next level of the chain of command?
A Above the head nurse, you mean?

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Q Above the head nurse, who is the person who deals with the people above the head nurse?
A We have an assistant chief nurse and associate chief nurse. The associate chief is in charge of the nursing education, and the assistant would be in charge of all the staff nurses.
Q So if the head nurse has a problem and needs to deal with it, he or she talks to the --

1889

A There is an intermediate between those two. There is a supervisor, area supervisor. I left them out.
Q And by problem, I mean if there's something that the head nurse needs from the hospital that he or she doesn't have, there's a procedure by which they can make that --
A She would go to her area supervisor, and it would go to the assistant chief nurse, to the chief nurse.
Q And, likewise, if there are problems that the head nurse wants to bring to people's attention, he or she does the same thing.
A Yes. Yes.
Q And in your experience, how would you describe the relationship between the head nurses and the higher ups at the VA?
A Hopefully they were good.
Q That's the goal, isn't it?
A Yeah.
Q And with respect to the directors of the institution, as a head nurse, did you have occasion to deal with the director of the hospital on occasion?
A Yes, I did. I got a 25-year pin. Anytime

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we got a pin for years of service, we got it from the director.
Q And we saw some exhibits this morning of awards Mrs. Wiley got that were signed by the director of the hospital.
A Yes.
Q Would you have occasion to deal with the director of the hospital besides the times when you were getting awards?
A Not directly, no.
Q You'd have to follow the chain of command?
A Yeah.
Q The safety committee that you told us about, can you explain to us who was on the safety committee?
A A member from various hospital departments.
Q And by various departments, what do you mean by that?
A All right. That would include nursing, medical staff, social workers, psychologists, PM and R. That's physical medicine, rehabilitation. There's so many. But every department.
Q And how would you decide or how would they decide who from those departments should be

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on that committee?

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A I don't know how the other departments did it, but our chief nurse selected the one in nursing service.
Q And what was that committee supposed to do?
A We were concerned about any safety factors within the hospital.
Q Now, am I correct that that was not the committee that set policy for the hospital with respect to smoking; isn't that right?
A If it were a problem that we were concerned about, yes, it would include that, but they were not the official smoking committee. Is that what you're referring to?
Q Yes. There were rules and regulations about smoking that came from the administration.
A When they decided to put the patients in particular smoking areas, rather than letting them smoke anywhere, I'm sure there were policies that came out at that time.
Q And would those policies come from Washington or would they come from Marion?
A We got both, if I remember correctly.
Q And when I say "come from Marion," I mean there from the administrator of the

1892

hospital.
A Yes. Yes.
Q You also mentioned that one of the things nurses did was to keep current, I think you used those two words, keep current?
A Uh-huh.
Q Would you explain that for me.
A Tried to keep up on the current knowledge that would be available to nursing at that time.
Q And how would they do that?
A By reading journals and going to workshops and this type of thing.
Q Would they get time off to go to those workshops?
A Depended. Some we did and some we had to use our own time off.
Q Do you know how often or what percentage of the time nurses would use their own time or time off to do that?
A I can only speak for myself. I went a few times on my own, yes.
Q The exhibit that they gave you, 21-48, do you still have that in front of you?
A No.

1893

Q Is there any -- remember, it's the list of Mrs. Wiley's employee education and training Mr. Cross asked you about?
A What's your question?
Q Well, do you remember what he showed you, that list of courses?
A Yeah.
Q Is there any way to look at this list and figure out how much of this Mrs. Wiley did on her time as opposed to work time?
A I wouldn't have any idea.
Q As these types of lists go, is that a long

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list?
A I would say so.
Q Most of your nurses didn't do this much --
A No.
Q -- training?
A No.
Q And one of the courses, it says here under hours, some of these courses were eight hours long; is that right?
A Yeah. Might be an all-day workshop.
Q And it looks to me like Mrs. Wiley was going to four or five of these a year?
A That's very possible.

1894

Q And one of them says, JCAHQ, standards for nursing care. Is that something to do with the joint commission?
A Sure does.
Q Tell us what the joint commission is.
A It's a commission of several people that comes in to inspect your hospital.
Q And do they do that on a regular basis at your hospital?
A Yes.
Q Would they talk with staff and employees?
A Yes.
Q And would they do it in a way that was anonymous, so the administration didn't know who they were talking to?
A I think they used both secretive and straightforward --
Q Okay.
A -- interviews.
Q And what was it they were reviewing or looking for in general terms?
A They were trying to see where we need to improve patient care.
MR. OHLEMEYER: Thank you, Mrs. Hughes. That's all I have.

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THE COURT: Mr. Wagner.
MR. FURR: I just have a few.
THE COURT: Mr. Furr.

CROSS-EXAMINATION
BY MR. FURR:
Q Hi, Mrs. Hughes. My name is Jeff Furr. I just have a very few questions. I believe you said you were in nursing education between 1962 and 1977; is that right?
A Yes. Yes.
Q And I think you said that you would have been on 16A on every day that you had students over on 16A; is that correct?
A That's right.
Q But you didn't have students on 16A every day, did you?
A No. No.
Q How often would you have had students on 16A?
A It was not on a regular schedule. You never knew when they were going to bring in a new class.
Q Okay. Then you moved on to become a staff

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nurse between 1977 and '85?
A Yes, I did.

1896

Q Where were you assigned when you were staff nurse? I didn't get that from your direct examination.
A Okay, I was on Building 1, Building 2, Building 17, and Building 10 and 11.
Q Okay. So during -- between '77and '85, you were never assigned to Building 16; I take it?
A No.
Q You retired in 1985.
A Yes.
Q So you would have retired before Mrs. Wiley became a head nurse; is that right?
A I believe that's correct.
Q I think you said that you didn't like the presence of the tobacco smoking in the building when you were a nurse; right?
A That's correct.
Q Was that -- did you talk about that with other nurses?
A Not particularly, no.
Q Have you ever talked to Mr. Cross before you came up here and testified today? With the lawyer that asked you questions, have you ever met Mr. Cross before?

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A Not until today.
Q Had you ever met any of the lawyers for the plaintiffs?
A Yes.
Q Who have you met?
A I met Mr. Howard.
Q Anyone else?
A And Mr. Young.
Q And Mr. Young?
A Uh-huh.
Q How did you meet them?
A I had a conference with them.
Q They came out to talk to you?
A Yes.
Q How many times did they come out to talk to you?
A I believe Mr. Howard came three times, and Mr. Young once or twice.
MR. FURR: Okay. Thanks a lot, Mrs. Hughes.
THE COURT: Redirect, Mr. Cross?
MR. CROSS: Yes, Your Honor, very briefly.
REDIRECT EXAMINATION
BY MR. CROSS:

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Q Let the record show it was a pleasure to make Mrs. Hughes' acquaintance today.
You stated in response to a question from Mr. Ohlemeyer that you kept current on nursing and nursing things by reading journals and going to workshops; correct?
A Yes. Yes.
Q Over what period of time did you read

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journals and go to workshops?
A During the whole time I was employed, and I still take the American Journal of Nursing.
Q You still do that today.
A Yes.
Q Up until the time you retired, do you ever recall there being -- the subject of one of those journals or one of those workshops being secondhand smoke?
A There was never any.
Q Now, in response to a question from Mr. Furr, you mentioned a number of other buildings that you worked in as a staff nurse following the termination of your educational responsibilities.
A Yes.
Q In those buildings, was the smoke the same

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as, worse, or better than what they were in Building 16?
MR. FURR: Objection, Your Honor, this is repetitive. This was covered on direct.
THE COURT: I think we've been through this, Counselor.
MR. CROSS: All right.
THE COURT: I know we have.
Q And finally, Mrs. Hughes, you stated that you would talk to other nurses about various subjects towards the end of your career at the VA Hospital.
A Yes.
Q And after reading these journals or going to these workshops, would you discuss the subject matter with the other nurses?
A Yes, I did.
Q And, finally, did you ever have any conversations with any of these nurses about the subject of secondhand smoke?
A No, I didn't.
MR. CROSS: No further questions. Excuse me, Your Honor, one moment.
No further questions, Your Honor.

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THE COURT: Mr. Ohlemeyer.
MR. OHLEMEYER: Nothing, Your Honor. Thank you, Mrs. Hughes.
MR. FURR: No further questions.
THE COURT: Thank you, ma'am, you may step down.
Call your next.
MR. CROSS: Your Honor, the plaintiffs will now call Rex Hughes. We have to go get him.
THE COURT: Afternoon.
THE WITNESS: Afternoon, sir.
THE COURT: Raise your right hand, please.
PLAINTIFFS' WITNESS, REX HUGHES, SWORN
DIRECT EXAMINATION
THE COURT: Have a seat right over there, please.
Would you tell this jury your name.

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THE WITNESS: Rex Hughes.
THE COURT: Spell your last.
THE WITNESS: H-U-G-H-E-S.

BY MR. CROSS:

Q What's your address, Mr. Hughes?
A [DELETED].

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Q How old a man are you?
A Pardon?
Q How old a man are you?
A 74.
Q Are you employed at this time?
A I have my own business. I'm a locksmith and sharpener.
Q Now, who lives with you at that address?
A My wife, Betty.
Q And there was a Betty Hughes that just testified, finished testifying in this cause just a few minutes ago. Would that be the same person?
A That is.
Q All right. How long have you been a locksmith, Mr. Hughes?
A Since 1972. I've been in business since '84.
Q And where is your locksmith business located?
A I work out of my own home.
Q And what did you do before 1984?
A I was -- I worked at the Veteran's Hospital at Marion, Indiana. The last ten years I was there I was locksmith there, and before

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that I was a nursing assistant.
Q Okay. Let's go back to the beginning of your employment at the Veteran's Administration Hospital in Marion. What year would you have first started to work there?
A 1958.
Q And when you first took on employment at the Veteran's Administration Hospital, in Marion, what did you do for them?
A I was a nursing assistant.
Q And what exactly is a nursing assistant?
A Helped -- helped the nurses. I done a lot of things to take care of nursing -- helping to nurse patients: Bed baths, showers, anything it took to help to take care of them.
Q What kind of training did you have to become a nurse's assistant?
A In the Army I was -- I done the same type of work in the Army as what I had done -- as that type of work there.
Q Same kind of work?
A Yes.
Q Is that where you learned how to do this, in

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the Army?
A Yes.
Q Would you tell the jury when you were in the Army.

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A I was in the Army from 1943 to 1946. During World War II.
Q And where did you serve?
A Two years in the Pacific, I was on -- I spent some time in the Hawaiian islands, but I also went on down from there to Saipan. Then from there back to Hawaiian islands, from there back down to -- Iwo Jima, Okinawa, into Japan and back home.
Q What was your rank?
A When I come out of the service, I was a technician 4th grade, which is the same pay grade as a sergeant.
Q And what is it you exactly did in the Army?
A I done -- I took care of the patients. They came to me. I was in the admission area; they came to me, and I saw them before the doctors even saw them sometimes. They came in right off the battlefield, right into the hospital.
Q And did you receive any medals or awards

during your -- for your Army service?
A I received them, but I didn't receive them for many years later. During World War II they did not give any medals. They gave us ribbons. A few years back I applied for the medals that I was supposed to have received, and at that time they informed me that I had received a Bronze Star.
Q What is a Bronze Star?
A It's a medal for, I guess, being in close contact with the military in a place where we were probably in danger.
Q The last question along this line, Mr. Hughes, in all modesty -- rather your modesty notwithstanding, the Bronze Star is a pretty significant medal, significant award; is it not?
A Yes, I think so. Yes. They made higher ones, but it was not the lowest one.
Q It was up there, was it not?
A Yes.
Q Okay. So when you became nursing assistant, how did you come to be a nursing assistant at the Veteran's Administration Hospital in 1958?

A Went there and applied for a job, and that's where I got the job.
Q And were you assigned to a particular building or a particular location or how did that work?
A I was assigned to the medical ward. At that time that was the only -- at that time we did not have what you call nowadays intensive care, and so we had -- we took care of the very, very sick patients.
Q What buildings were you in during your time as a nursing assistant?
A Started out on Building 25, went from there to 124 and 15. From there I went -- was assigned to Building 16.

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Q So you are familiar with the building where Mildred Wiley worked?
A I worked on the same building that she did, yes.
Q Did you know Mrs. Wiley?
A Yes, I did.
Q How did you come to make her acquaintance?
A She was one of the nurses on the building when I was there.
Q Now, did there come a time when you no

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longer worked at the hospital as a nurse's assistant but, in fact, took on another position?
A Yes. After I worked on Building 16, from there I went to engineering, worked as a carpenter, and my official title was carpenter/locksmith. I done the locksmithing there as long as it was locksmithing to do. Whenever there wasn't any locksmithing, then I done carpenter work.
Q When did you retire from the VA?
A 1984.
Q So approximately how many years did you work as a carpenter/locksmith?
A Ten years. I went over there in '74.
Q Okay. Now, when you were assigned to -- when you were assigned to a specific building as a nurse's assistant, would you get out and around to other buildings very often?
A I went to every building on the entire compound, which very few people out there went to as many buildings as I did.
Q I was asking you, is this while you were a

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locksmith you were doing this? Or --
A Yes. Yes.
Q My question, Mr. Hughes, was when you were a nurse's assistant and you were assigned to a particular building, would you have occasion to go to other buildings?
A Occasionally I was assigned for a few days, one day or two at a time. One time -- a few times I was assigned for a full month on evenings or nights on a different building than I was on.
Q But after you became a carpenter or a locksmith, you got around.
A I was on every building out there.
Q Okay. And how often would you get to a particular building? Say, let's -- with specific reference to Building 16, when you were a carpenter/locksmith, how frequently would you get to that building?
A I would say probably at least a couple of times every month. Sometimes more often than that.
Q Now, when you worked at Building 16 as a nurse's assistant, did you have occasion to observe whether patients would be smoking?

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A Yes, at that time.
MR. OHLEMEYER: Excuse me, Your Honor. The question calls for a yes or no.
THE COURT: I think you've answered it, sir. He asked you whether or not you saw that, and you said yes.
THE WITNESS: Yes.
Q I'm not sure the question contained this, so let me cover this ground again.
Did you have occasion to observe whether the patients would be smoking in Building 16?
A Yes, they were.
MR. WAGNER: Excuse me. I don't mean to interrupt, but I'm sure we don't have a time frame here.
THE COURT: You're right. Fix a time. You're talking about when he was a carpenter/locksmith for the ten-year period?
MR. CROSS: No. I think the question stated when he was a nurse's assistant, assigned to Building 16.
MR. WAGNER: But I don't think we have a date on that, Your Honor.
MR. CROSS: That was given in

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earlier testimony. I'll be glad to establish that again.
THE COURT: When were you a nursing assistant, what years?
THE WITNESS: From 1958 to 1974.
THE COURT: Thank you.
BY MR. CROSS:
Q And when did you work in Building 16, Mr. Hughes, as a nurse's assistant?
A From 1971, 1971 to 1974.
Q Did you observe, was it the patients that were smoking?
A Patients and personnel. The only restriction was, they were not -- nobody was allowed to smoke in the bedrooms, patients or personnel.
Q And did you have occasion through your observations to reach an opinion as to what percentage of the patients would be smoking in Building 16 during that time?
A It would be pretty high. I would say probably 80 percent.
Q And did you have an opinion from the same sources as to what percentage of personnel would be smoking in Building 16?

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A I'm sure it would be over 50 percent.
Q And when you stated -- you used the word "personnel," what did you mean by personnel?
A I didn't work in personnel.
Q No. You said personnel, patients and personnel would be smoking. Who are the personnel?
A Nurses and nursing assistants, doctors.
Q Are you familiar with the term "day room"?
A Yes, I am.
Q What is the day room?

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A Day room is where the patients spend almost all of their daylight time in one room where all of them congregate, and they have access to smoking in there, they have access to sometimes some games and other things. They spend their entire day in there.
Q Now, as a carpenter/locksmith, did you have occasion to observe the ventilation that existed in Building 16 after you became a carpenter/locksmith?
A The ventilation was improved after I left nursing service. They put in some ventilation fans, some of the buildings had -- I don't remember about 16, but

several of the buildings had what they called smoke eaters. I wondered how much good they done.
Q Why did you wonder that?
MR. OHLEMEYER: Objection, Your Honor. Lack of foundation.
THE COURT: Overruled. You can answer.
A The smoke eaters, you could go into a building that had the smoke eaters in, and they had about as much smoke as the other buildings.
Q Did you observe smoking in buildings other than Building 16?
A I don't think there was any building out there but what there was smoking in the buildings.
Q Was that true in 1984 as well, when you retired?
A Yes, it was.
Q Were there times -- were the ventilation fans that you referred to, would they run continuously?
A No, they did not. In the wintertime, they sucked so much air -- heat out of the

building that they weren't turned on very much in the wintertime. They tried to run them in the daytime during the summertime.
Q Did they have the windows on in the summertime? I'm sorry, did they have the windows open in the summertime?
A The windows had blocks in them so they could only be opened, I think it was, five inches; because the patients, there had been patients crawl out through the windows and commit suicide.
Q So when were the stops put in the windows so that they could only be opened five inches, if you recall?
A I'm not sure when it was. It was early in -- after I had worked there just a short time.
Q And were those stops still in the windows in Building 16 when you retired?
A To the best of my knowledge, they were.
Q Thank you.
How is your health, Mr. Hughes?

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MR. WAGNER: Objection.
Irrelevant, Your Honor.
THE COURT: Sustained.

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Q Did you ever have occasion to observe an instance when some of the patients in the hospital would be provided free cigarettes from someplace?
A Yes. Many years out there, any patient that did not have funds of their own, any patient, if they did not have funds of their own, they were provided free cigarettes.
Q Do you know who provided those cigarettes?
A I'm not completely sure. Different organizations donated them. I have heard that some of the tobacco companies.
THE COURT: Sir, we don't want you to guess or speculate here. Just tell us what you know.
Q Mr. Hughes, did you ever have occasion -- did you ever have occasion to observe what brands of cigarettes would be provided to these people free of charge?
MR. WAGNER: May we approach again, Your Honor?
THE COURT: Same issue?
MR. WAGNER: Same issue.
THE COURT: Objection is sustained.
MR. WAGNER: Thank you, Your Honor.

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THE COURT: You don't have to answer that last question, sir.
THE WITNESS: Thank you.
Q When you were in the military, were you provided free cigarettes in World War II?
MR. WAGNER: Objection, Your Honor. Relevancy.
MR. OHLEMEYER: Objection.
THE COURT: Sustained.
MR. MOTLEY: Your Honor, may we approach the bench on that?
(Bench discussion)
THE COURT: The last objection is overruled. Restate your question, Mr. Cross. And it had to do with his military service.
Q Mr. Hughes, you were, during the time that you served in the Pacific theatre in World War II, were you personally provided cigarettes at no cost?
A Yes, I was.
Q And were you a smoker at that time?
A Yes, I was.
Q Did you subsequently quit smoking?
A Yes, I did.

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Q How did that come about?
MR. WAGNER: Your Honor, objection. It's irrelevant as to the --
THE COURT: How he quit is irrelevant. Sustained.
MR. CROSS: All right.
Q But you no longer smoke.

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A I do not smoke, no, not now.
Q What quantity of cigarettes was provided to you while you were in the military?
MR. WAGNER: Objection, Your Honor, as to relevancy again. We're talking 1943, 1946, and it's this witness and not anything connected with this case. I don't see the relevancy of any of this.
THE COURT: That's a fair question. You can tell us. Objection overruled. Question was what quantity did they give you.
A I know they gave -- I smoked a package of cigarettes a day, and they gave that many. and I think some of them smoked more than that, and I think they were given more.
Q All right. And were you given just one brand or different brands, several brands?

MR. WAGNER: Your Honor, again, I have to object, Your Honor. I can see where this is going. It's going --
THE COURT: Well --
MR. WAGNER: It's going even farther than we anticipated, Your Honor. This is far beyond the bounds of being relevant as to this man --
THE COURT: Sustained as to the brands he was given.
MR. CROSS: One moment to confer, Your Honor.
THE COURT: All right.
(A discussion was held off the record.)
Q Mr. Hughes, when you were working in the carpentry/locksmith aspect of your employment, drawing your attention to the years 1974 to 1984, did you ever have any involvement in cleaning the day room in Building 16?
A In cleaning?
Q Yes, sir.
A No. No, sir.
Q Was there ever a time when there needed to be any work done to the ceiling tiles in

Building 16, in the day room?
A Yes. Yes, there was. Many times. The ceilings were completely tan from the cigarette smoke.
Q What needed to be done to those?
A They had to clean them with -- they tried all kinds of different chemicals to clean them with. They used -- I think the last -- the strongest thing that I know of that they used was floor tile stripper.
Q Were you involved in that process?
A No, I was not involved in it. I saw it. I saw them using it.
Q And who was using them?
A The housekeepers.
MR. CROSS: No further questions, Your Honor. Pass the witness.
THE COURT: Mr. Ohlemeyer.

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CROSS-EXAMINATION
BY MR. OHLEMEYER:
Q Good afternoon, Mr. Hughes. My name is Bill Ohlemeyer.
A Good afternoon.
Q That process occurred before the ventilation systems were in place; right?

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A This occurred even afterwards.
Q Am I correct that you were a carpenter -- let's back up. You were a nursing assistant in Building 16.
A Yes, sir.
Q Or in other buildings?
A I was, the last that I -- the last that I was a nursing assistant was in Building 16.
Q Okay. So when you switched from a nursing assistant to a carpenter, your last assignment was in Building 16?
A Yes.
Q How long had you been in Building 16?
A Approximately three years.
Q If the evidence in this case is that Mrs. Wiley started working there in August of 1973, then you were only there when she was there for about a year; is that right?
A Something close to that, yes.
Q Do you recall whether -- did you work on her team or with her group of nurses, or were you in another part of the building?
A I was on her team.
Q And were you on 16A or 16B?
A 16B.

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Q B?
A Yes.
Q Do you know whether Mrs. Wiley was assigned to 16A or 16B when she started at the VA?
A At that time, I'm sure she was on 16B.
Q Is that a fact that should be in her employment record somewhere?
A I suppose it should be.
Q Have you ever seen your employment records from the VA?
A I haven't seen it since I left there.
Q Does it describe where your assignment is in --
A Yes.
Q So we could go to Mrs. Wiley's employment records and figure out what her assignment was at any point in time through those records?
A I suppose. If you're looking, look for mine, because it's been long enough that I might have forgotten where I was at.
Q You worked at the VA for a long time?
A Yes. 27 years.
Q How many?
A 27 years.

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Q And some of those memories do kind of tend to run together, don't they?
A Yes, they do.

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Q Now, when you became a carpenter -- one more question about the nursing assistant. Your wife testified a few minutes ago and described the fact that she was a head nurse.
A Yes.
Q She also told us there was a chain of command where the head nurses would direct and supervise other nurses who would direct and supervise the nursing assistants.
A Yes.
Q Is that pretty much the way it worked when you were working?
A Yes, it is.
Q Did your wife ever direct or supervise your work?
A No. That was -- she was in nursing education, and I took some classes under her. At that time we were not married.
Q So you became a carpenter in 1974 then.
A Yes.
Q And then from 1974 to 1984, you were in any

number of buildings at the VA.
A I was in every building out there. We changed -- during the time that I was carpenter/locksmith, we changed every lock on every building.
Q How many buildings are there?
A I'm not sure. There's an awful lot of them. There's over a hundred.
Q A hundred different buildings?
A At that time. They weren't all patient buildings. I went on a lot of buildings that were not patient buildings.
Q What would those buildings have been?
A Some of them were maintenance buildings, some just -- everything that they needed buildings for out there.
Q And then you retired in 1984.
A Actually retired in '85. I was off for several months on sick leave before I left.
MR. OHLEMEYER: That's all I have. Thank you, Mr. Hughes.
THE COURT: Mr. Wagner, Mr. Furr.
MR. FURR: Just one, Your Honor.

CROSS EXAMINATION

BY MR. FURR:

Q Hi, Mr. Hughes. My name is Jeff Furr.
A Hi.
Q I've got just one question for you. Who made the decision not to turn those ventilation fans on during the winter?
A I really don't know who made the final decision on them. I do know that they were turned off because they drawed too much heat out of the building.
Q That decision would have been made by somebody at the VA Hospital, wouldn't it?
A Yes.
MR. FURR: Okay, thank you.
THE COURT: Redirect, Mr. Cross?

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MR. CROSS: Very brief, Your Honor.
REDIRECT EXAMINATION
BY MR. CROSS:
Q Mr. Hughes, 16A and 16B are not different buildings, are they?
A They're the same building. They were under -- one was on the first floor, one was second floor.
Q Isn't it the fact that the letter A or B just designates the floor in Building 16?
A Yes.

Q So there's a 16A, 16B, and 16C, but those are just floors in Building 16?
A That's right.
Q And lastly, Mr. Hughes, after you were no longer a building -- after you were no longer a nursing assistant in Building 16, in 1974, did you continue to have an acquaintanceship with Mildred Wiley?
A Yes. Whenever I'd go in the building, I would -- we were friendly. I always thought she was a very nice person.
Q And, in fact, did you maintain that friend relationship until the time of your retirement ten years later?
MR. FURR: Objection, Your Honor. This is beyond the scope of cross-examination.
MR. CROSS: No, it isn't, Your Honor. They went into the fact that they left; he only knew her for a year.
THE COURT: All right. You can answer the last. The question was, did you know her after your retirement.
MR. CROSS: No.
A Not after my retirement, no.

Q But you did know her from the time that you left Building 16 in 1974 up and to the time of your retirement?
A Yes, I did.
Q And did you --
MR. CROSS: That's all. Thank you.
THE COURT: Mr. Ohlemeyer.
MR. OHLEMEYER: Nothing further, Your Honor.
THE COURT: Mr. Furr.
MR. FURR: No, sir.
THE COURT: Thank you very much. You may leave the stand. Do we need ten minutes?
(Standard admonition)
(A brief recess was taken.)
MR. CASSELL: All rise.
THE COURT: Be seated. Now, that you are all comfortable, ladies and gentlemen, let me tell you where we are this evening. There are some matters of documentary evidence, documents and things of that nature, that we're going to deal with at this point. Rather than bring you in for five minutes, take you out for ten

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minutes, bring you in for five minutes, we're going to dismiss you at this point. We're going to start tomorrow morning again as 8:30. The reason I brought you in, I want to remind you, leave your notes in the jury room, do not talk among yourself about the case, do not read anything in the newspaper about the case or listen to anything on the radio or television. Keep an open mind and above all, do not form or express any opinions at all about this case.

We'll start tomorrow morning at 8:30, and my plan is to go with the noon break, of course, to around 5:30 tomorrow evening. So under those instructions, I'll see you in the morning. Good evening.

MR. CASSELL: All rise.

(Outside the presence of the jury)

THE COURT: All right. Be seated. Jury is not now present, we're still on the on the record. What does the plaintiff intend to introduce in the way of documentary evidence, Mr. Motley?

MR. MOTLEY: May it please the Court. Would you like me to pass these up

one at a time or en mass?

THE COURT: Just hand them all up? Do the defense, do you have a copy of all these?

MR. OHLEMEYER: We do, Your Honor, although I'm not sure which list we're working from.

MR. MOTLEY: We gave them the document, that list right there.

MR. OHLEMEYER: All right.

MR. MOTLEY: We tried to give them the ones we want to try to get in, separated out according to the day we want to do it.

THE COURT: All right.

MR. MOTLEY: Your Honor, these are the first two, Your Honor. She's assembling the rest. This is the Frank Statement. I apologize for illegibility.

THE COURT: That's all right.

MR. MOTLEY: Judge, this is an advertisement placed by all the defendants, save Liggett, in January 1954, in 300 some odd newspapers around the United States.

THE COURT: You're referring to the Frank Statement 10245A?

MR. MOTLEY: Yes, Your Honor, I am. And what we've given, Your Honor, I believe are copies of the Frank Statement as it occurred in the Muncie newspaper, which is A, and in the Indianapolis, various Indianapolis newspapers. Your Honor, I'll be glad to -- this was placed in the Muncie Star Monday, January 4, 1954.

MR. OHLEMEYER: I can shortcut some of this, Your Honor. I have no objection to

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this as long as we get a legible copy into evidence.

THE COURT: It is a bad copy, I agree.

MR. MOTLEY: Your Honor, what I would like to do, if you don't mind, I'll have this retyped. We can attach a retyped version to the actual advertisement.

MR. OHLEMEYER: How about if I find a clean copy of an actual advertisement.

THE COURT: Library can do a photocopy, I think.

MR. MOTLEY: That's where we got this, Judge.

THE COURT: Oh, it is.

MR. MOTLEY: What I was suggesting was, we put that into evidence but we, and I'll make sure they agree that I've retyped it correctly. Then we just type up like a memo form.

THE COURT: We will do that unless they find a better copy.

MR. OHLEMEYER: I can get a better copy.

MR. WAGNER: Your Honor, the record also ought to reflect when the reference to all defenses was made. We're not talking about non-manufacturing defendants.

MR. MOTLEY: This is -- goes against the Council For Tobacco Research as well as the manufacturers, excluding Liggett.

MR. SHOCKLEY: Your Honor, when it's published to the jury, we'd request a limiting instruction as to the holding company defendants, that's American Brands, RJR Nabisco Holdings, Inc., and --

MR. WAGNER: Wait a minute.

MR. OHLEMEYER: We'll talk about that.

MR. SHOCKLEY: All right.

MR. MOTLEY: We offer it against all the companies who are attached to or, in fact, did do cigarette manufacturing, including the holding company.

THE COURT: All right. You still request a limiting instruction, Mr. Shockley?

MR. SHOCKLEY: Could we be heard on that at a later time, Your Honor?

THE COURT: Yes. 10245A and there's no objection to 10245B either? That's Indianapolis Star.

MR. OHLEMEYER: That's correct, Your Honor.

THE COURT: All right. Those will be admitted tomorrow. Actually I'll admit them now. We'll advise the jury tomorrow.

(Plaintiffs' Exhibit(s) 10245A and 10245B received in evidence.)

THE COURT: All right. Go ahead,

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Mr. Motley.

MR. MOTLEY: Your Honor, the next one was 20926.

Your Honor, 20926 is offered against

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Brown & Williamson and BAT. It is a 1978 group research and development conference, Your Honor.

Your Honor, the relevance of this is, this document deals both with smoking and health and secondhand smoking and health. It contains an admission by the chief scientist of BAT, Dr. S.J. Green, that the issue of cigarette smoking and health which continues to this day to be contested by some of these defendants has long ceased to be an area for scientific controversy, 20 years antedating this date. It was produced by BATCO, in the state of Florida case, Your Honor. It's clearly a corporate admission against interest. We do not seek to enter this document against other defendants --

THE COURT: Understand.

MR. MOTLEY: -- at this time. Now, it may come a time when we lay a predicate to offer this under 801(2)(d)(e), which is admission of a co-conspirator. But at this time we seek only to introduce against BAT and Brown & Williamson.

I can go over some of the other areas

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in this document, Your Honor, which relate to the relevance of it, but it clearly involves the admission I just stated plus a discussion of the dangers of secondhand smoke.

THE COURT: Brown & Williamson wish to be heard?

MR. OHLEMEYER: Your Honor, this is a document apparently, according to Mr. Motley, taken from the files of a company known as British American Tobacco Company. They're not a party to this case. There is no evidence, no foundation as to who said any of this. It is somebody's notes on a research and development conference. It contains hearsay described, some with attribution, some without attribution, and there's no evidence that this was communicated to, agreed to, acted upon, by any of the companies, including Brown & Williamson, parties to this lawsuit.

MR. MOTLEY: Well, the last page will show you who wrote it, Your Honor. It says SJG, Sidney J. Green, the head of research and development for the BAT group.

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Your Honor, under Rule 104, we'll certainly connect up later the interrelationship between BAT Company, Big BAT, and Brown & Williamson, but that's the question of admissibility, generally, relevancy conditioned on fact, matters of

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that sort. It's a chicken and egg situation, Judge. As you know, if I don't link up BATCO with Brown & Williamson and BAT Industries, the document will be stricken. But we have to start somewhere, and I didn't choose to start the case with getting into corporate intricacies and all of that, we will, of course, and have listed exhibits which will deal with that.

THE COURT: Mr. Reynolds, care to be heard?

MR. REYNOLDS: Yes, I do, Your Honor. Since the document is being admitted against two named organizations, one of those named organizations is not a defendant to this lawsuit. Now, he can talk about Big BAT, little BAT, bat caves and the rest of it. The fact is he has not established that they are not separate corporations. They

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are separate corporations. He knows that, as do I, that Mr. Green is not an employee of BAT Industries. He was an employee of British American Tobacco Company. It is a British American Tobacco Company document. They could have sued British American Tobacco Company had they chosen to do so. They did not. And it's the chicken and the egg in this case, I think the Court should make him produce the egg, and then we'll talk about the chicken, or BAT, if you prefer.

MR. MOTLEY: Your Honor, we laid a predicate with our conspiracy proffer, which Your Honor had us spread these facts out in that record, in part, and we've done that, Your Honor. So we've laid -- we've made a sufficient showing of a conditional relevancy here, your Honor, for this document to be admitted.

Again, if it comes a time where Your Honor is satisfied that our theory of impersonna jurisdiction and our theory of liability is not satisfied, all of these documents will be stricken, the ones that

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don't so support our claims.

MR. REYNOLDS: Your Honor, we have a piece of paper; the piece of paper has words on it. What they have to do is show that the words on those pieces of paper, in order to introduce it against the defendant in this case, have to meet the rules for evidence against the defendant. They have not shown that BAT, or BATCO referred into there is my client. We know, and they have admitted for other purposes on the record, that there are two such companies. And it seems to me, particularly since I know and I believe Mr. Motley knows that Mr. Green is an employee of British American Tobacco Company, not -- or was at that time, not a defendant in this case, it seems incumbent

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on this Court not to admit it at this time against the defendant BAT Industries.

If, in fact, he can connect it up later, let's see what he can do. Why let it in against us now on some theory that maybe he will connect it up later.

MR. MOTLEY: It's not some theory, Your Honor. You've got a rule right here in

your book of evidence that says this is exactly how you proceed. Rule 104. In any case, Judge, you can't prove every fact on the first hour of the trial. That's the reason you got a Rule 104.

And I stand in my place as an officer of the Court, Counsel knows full well we have an abundance of evidence here that deals with the relationship between BATCO, BAT Industries and Brown & Williamson; in fact, we've got a live witness coming -- I don't know when he's coming, but he's a former vice president of Brown & Williamson and has been deposed, Your Honor, and the defendants know full well what his testimony is about the interrelationship, who did the research and how it was communicated one to the other. So I recognize that I have to -- I have to link this up, but that's what Rule 104 is all about.

THE COURT: When will that executive be here?

MR. MOTLEY: Well, Judge, he was supposed to be here last week. We got backed up. It's Dr. Jeffrey Wigand, former

vice president. But, Judge, every document that does not have a propounding witness, okay. Some of these documents are 50 years old, so we don't have a witness that can form a 104 conditional relevancy predicate for every document. Some of them are ancient documents. Your Honor has already let one BAT document into evidence in the face of this same argument.

MR. REYNOLDS: No. Based upon your statement that it was a British American Tobacco Company document.

MR. MOTLEY: That's what this is.

MR. REYNOLDS: All right. Then why is it being admitted against BAT Industries?

MR. MOTLEY: Because we have a conspiracy theory of jurisdiction, conspiracy theory of liability, and BAT Industries is interrelated with BATCO and Brown & Williamson, Your Honor, and the document that you already let in is 18064. You made the same argument there.

THE COURT: Mr. Ohlemeyer.

MR. OHLEMEYER: I share Mr. Motley's frustration with proving

evidentiary foundations in a case that involves conduct that stretches out over

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fifty years. As frustrating as it may be, there still needs to be an evidentiary foundation. Just because the document exists and the words exist don't make it admissible. If he has somebody he's going to provide that evidentiary foundation, let him bring that witness and we'll deal with it at that point.

THE COURT: I agree. I'll deal with that if and when the witness comes. 29026 will not be admitted at this point. It may however revisit that issue after Mr. Wigand testifies.

What's the next matter?

MR. MOTLEY: Your Honor, here's a big stack, Judge. I hope those are seriatim.

THE COURT: Thank you.

MR. MOTLEY: Your Honor, this document was produced by Philip Morris.

MR. OHLEMEYER: Exhibit number, please.

MR. MOTLEY: Sorry. 10813. It's

more than 30 years old, purports an ancient document, therefore by definition it's not hearsay, produced from the files of a defendant in this case, contains admissions against the corporate interest of Philip Morris, and against the corporate interests of BAT.

THE COURT: Any objection to 10813, Mr. Ohlemeyer?

MR. OHLEMEYER: Yes, Your Honor. Foundation objections. There's no author or letterhead shown. There's no discussion of environmental tobacco smoke or nonsmokers, and at this point there's no evidentiary foundation to establish that any of this was either acted upon, agreed to, or communicated to Philip Morris, or at what point in time the document even found its way into the file. It appears from its face not to be something that was created by somebody at Philip Morris. And if Mr. Motley is correct, that he obtained this from Philip Morris, and I don't know that he did; but for the sake of argument we can assume he did, he still hasn't established

that evidentiary foundation.

MR. MOTLEY: Your Honor, this a report of a visit of two scientists who were affiliated with British American Tobacco Company, through the Tobacco Research Council, they list everybody in the United States who they visited, it's 34 years old, it's not hearsay, it's admissible on its face, 803. Under your rule 803-16, statements of the document in existence 30 years or more, the authenticity of which is established. He didn't object. He can't stand up here as an officer of the Court and

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deny that this is an authentic document because they produced it from their own files.

THE COURT: Mr. Reynolds, any comment?

MR. REYNOLDS: Yes, Your Honor. I would note again that he has indicated it's British American Tobacco Company individuals who are involved in this document, and therefore it certainly should not be admitted against BAT Industries on the basis of the record as it stands.

THE COURT: You're offering this document as to whom, Counselor?

MR. MOTLEY: At this point, as to Philip Morris.

THE COURT: Philip Morris only?

MR. MOTLEY: At this point.

MR. OHLEMEYER: Very briefly, Your Honor. See, here's the foundation that's lacking. Nobody can tell the Court when this document was communicated to Philip Morris. From all Mr. Motley knows, this finds its way into somebody's file as a result of a lawsuit like this. Nobody -- there's nothing in this document that says we sent this to Philip Morris at any point in time relevant to this lawsuit. They adopted it, they acted on it, they agreed with it, they disagreed with it, they argued with us about it. I don't think there's enough evidentiary foundation to admit this.

THE COURT: The objection to 10813 noted and overruled. However, the Court will direct plaintiffs' counsel to provide the Court tomorrow morning with a limiting instruction, Counselor. Any time I admit

these on a limited basis, I expect the offering party to prepare a limiting instruction that I'll read to the jury.

(Plaintiffs' Exhibit(s) 10813 received in evidence.)

THE COURT: What's the next matter?

MR. MOTLEY: Your Honor, the next is Exhibit 9448. This document was authenticated in a case pending in Florida that I handled called Conner vs. RJ Reynolds Tobacco Company. They stipulated it was authentic. It's obviously more than 30 years old. It's a survey of cancer research with emphasis upon possible carcinogens from tobacco.

Your Honor has already overruled the defendants' argument that if it doesn't deal specifically with environmental tobacco smoke, that it's got nothing to do with this case. You've let that evidence in already here before, so I assume I don't need to argue the relevancy of the hazardous nature to a secondhand smoke case.

THE COURT: This is offered as to

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whom, Counselor?

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MR. MOTLEY: At this point, Your Honor, just RJ Reynolds.

THE COURT: Mr. Ohlemeyer?

MR. FURR: I'll handle that, Your Honor.

THE COURT: Mr. Furr.

MR. FURR: It is just a survey of publicly available scientific literature. Your Honor, it contains multiple levels of hearsay, but perhaps more importantly there's really no relevance to this document. There's no foundation that the document was ever distributed to anyone. In fact, the author of this document has been deposed and has testified that he was a new employee to the company, that the document was created only to fill some downtime that he had while his laboratory was shut down, that he had no expertise in the area, that he was merely writing down the conclusions of others, that he had no ability to evaluate the information for himself, and that he's not even sure if the document was ever distributed to anyone.

MR. MOTLEY: It doesn't matter,

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Your Honor.

THE COURT: Not even sure -- I didn't hear the last.

MR. FURR: The document was ever distributed to any other employee in the company.

MR. MOTLEY: It's amazing that it shows up here with a Bates stamp here that says produced from RJ Reynolds from their files. Now, if doesn't matter, Your Honor, he's going -- these are all weight arguments that he's making. They don't go to the inherent admissibility of the document.

THE COURT: 9448 will be admitted with a limiting instruction.

(Plaintiffs' Exhibit(s) 9448 received in evidence.)

MR. MOTLEY: Again, Your Honor, that's limiting to RJ Reynolds, if I understand correctly.

THE COURT: Yes.

MR. MOTLEY: Your Honor, the next one is Exhibit 14333, which is produced by RJ Reynolds. This man was a senior research scientist, this is no musings in the garden,

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if you will, as we just heard. This document is a survey by a Ph.D. for RJ Reynolds, 1962. It's more than 30 years old. It's not hearsay; produced from their files.

Your Honor, this document, I know of four -- four instances where this document has been admitted, that I personally have argued it. It goes into a survey and it

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makes this conclusion: The evidence to indict cigarette smoking as a cause of cancer is beyond reasonable doubt. It's a clear and compelling admission by RJ Reynolds, 36 years ago, that cigarette smoke, the ingredients contained in their cigarette smoke was a potent carcinogen to human beings, a fact which they suppressed, and you'll hear testimony tomorrow about this document, in fact, being suppressed from the Surgeon General of the United States.

THE COURT: RJ Reynolds wish to be heard?

MR. FURR: Well, first off, I think that Mr. Motley at that time didn't

correctly characterize the last document. It wasn't mere musings of an employee that had no responsibility for the document. But, in fact, the actual conclusions came in this document, Your Honor, found on pages 13 through 14, where Dr. Rodgman states, "It is not my intention to suggest that this company accept the cigarette smoke health data at face value." So it's not an admission.

MR. MOTLEY: That goes to the weight, Judge.

THE COURT: I'm sure you can highlight that to the jury. 14333 will be admitted only as to RJR with a limiting instruction.

(Plaintiffs' Exhibit(s) 14333 received in evidence.)

MR. MOTLEY: The next one, Your Honor, is No. 319. I think that's right. Do you have 319, Your Honor?

THE COURT: Yes, sir.

MR. MOTLEY: Dated 1957. This was produced by Brown & Williamson, Your Honor, in the state of Florida litigation.

THE COURT: Yes.

MR. MOTLEY: More than 30 years old. Here's where they use -- your stamp may have --

THE COURT: Top of this says produced by B&W Chiles tobacco litigation, B&W protected by Minnesota tobacco litigation protective order.

MR. MOTLEY: Your Honor, this document would have been produced by Brown & Williamson in multiple litigations. That just happens to be the one we chose to present to Your Honor because it's clearer than some of the others.

And the relevancy of this document is obvious. The idea has arisen that there is a causal relationship between Zephyr, which was their code word for cancer, more than 30 years.

THE COURT: Do you have a better

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copy of this?
MR. MOTLEY: Judge, I'll try to find a better copy of it. May I see if yours is worse than mine, because mine, I can read fairly well. Can I approach?

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THE COURT: Certainly.
MR. MOTLEY: Judge, mine is better than this.
THE COURT: All right. I would hope. This is just offered as to Brown & Williamson?
MR. MOTLEY: At this time, it's merely -- it's offered against Brown & Williamson and BAT.
MR. OHLEMEYER: Once again --
MR. REYNOLDS: Your Honor, that document was written before such a thing as BAT Industries.
MR. MOTLEY: Well, they inherited it.
THE COURT: Brown & Williamson.
MR. OHLEMEYER: Your Honor, again it's a British American Tobacco Company document. There is absolutely no evidence that it was communicated to Brown & Williamson at any point in time, and there's really not even much evidence as to who or how it was prepared. I just don't see how there's an evidentiary foundation to admit this into evidence based on Mr. Motley's

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mere assertion that it was produced by Brown & Williamson.
MR. MOTLEY: It's not my assertion, your Honor, it's stamped. If you look in the back, there's a card from the Brown & Williamson library card catalog.
MR. OHLEMEYER: And the dates, well, I'm not going to even try to read it, Your Honor. The evidence --
MR. MOTLEY: Somebody read it.
MR. OHLEMEYER: Yeah, who? That's the point.
MR. MOTLEY: Checked it out.
MR. OHLEMEYER: That's the point. Who, when, why, that's the evidentiary foundation.
MR. REYNOLDS: Your Honor, this is another British American Tobacco Company document. I commented the document was generated before BAT Industries was even in existence. This is not a probate court case; we're not deciding who inherited what from whom. We were a corporation that came into existence in 1976. It cannot be introduced against us.

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MR. MOTLEY: I'll tell you what I'll do, for that one, Judge, since it's produced by Brown & Williamson. I'll just forego introducing it against BAT at this particular moment.

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THE COURT: Just offer it against Brown & Williamson?
MR. MOTLEY: Yes, Your Honor, who produced it.
THE COURT: I will tell you right now that I will tentatively admit this. If there is a better copy -- I am unable to read this, but --
MR. MOTLEY: May I show you my copy, Your Honor, and tell you this is better?
THE COURT: Yes, please. With a limiting instruction, Brown & Williamson only. That's much better. All right, 319 will be admitted as to Brown & Williamson.
(Plaintiffs' Exhibit(s) 319 received in evidence.)
THE COURT: Next is 1286.
MR. MOTLEY: Your Honor, this is a document that's offered against Liggett

only, produced by Liggett from their files. It's more than -- it's 37 years old. It says, "L&M, A Perspective Review. There are biologically active materials present in cigarette tobacco. These are cancer causing, cancer promoting, poisonous, stimulating, pleasurable and flavorful."
THE COURT: Liggett wish to be heard?
MS. ESAKOFF: No objection.
THE COURT: Any other defendants have an objection?
MR. OHLEMEYER: Absolutely, Your Honor. Again --
THE COURT: It's only offered as to Liggett now.
MR. MOTLEY: Well, we're going to offer it against everybody.
MR. OHLEMEYER: Well, I still think its prejudicial effect -- the probative value of this document being offered against Liggett is outweighed by the prejudicial effect it is going to have on these other companies, because Mr. Motley's entire theory of this case is there's one grand

conspiracy, and at some point he's going to argue this all connects up. And I don't think he's going to do that. And at this point I think you're going to have to connect it up before you admit this kind of evidence.
MR. MOTLEY: I don't know what he wants me to connect up, Your Honor. It's a statement against interest. The defendant who made the statement doesn't object. It's only offered against that defendant at this point in time.
THE COURT: Objection is noted and overruled, Mr. Ohlemeyer, but 1286 will be admitted to Liggett only, against Liggett only.

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(Plaintiffs' Exhibit(s) 1286 received in evidence.)

MR. OHLEMEYER: May I ask a question, Your Honor?

THE COURT: Yes, sir.

MR. OHLEMEYER: And I apologize. I've got the wrong -- I haven't looked at it carefully enough. I think at some point the defendants in this case are entitled to know

on the record whether there's a settlement case against Mr. Motley's case and Liggett.

MR. MOTLEY: There is no settlement in this case.

MR. OHLEMEYER: Where there is a --

MR. MOTLEY: I just made a statement on the record. There is no settlement with any party in this case.

MR. OHLEMEYER: Whether there is a high-low agreement.

MR. MOTLEY: There is no high-low agreement. There is nothing.

MR. OHLEMEYER: Well, Your Honor, at some point perhaps Mr. Motley would let me frame the appropriate questions, let me ask the questions.

THE COURT: How about now?

MR. OHLEMEYER: And then we'll get -- I'm not prepared to do that -- maybe tomorrow before court, to make sure that we've got the law in front of the Court on this subject, because I think it's very odd what's going on here with the Liggett company.

They're a defendant in the lawsuit, yet

Mr. Motley is calling their chief executive, who is beyond the subpoena power of the Court in this case, there are no objections to the introduction of their documents, at some point I think the Court can align Liggett with the plaintiffs as opposed to considering them a defendant, and that may have an effect with how the evidence comes in with respect to Liggett.

THE COURT: Thank you, Mr. Ohlemeyer.

MR. MOTLEY: There is absolutely no evidence in this record, Your Honor, there's any settlement, any settlement discussions, that anybody's made an offer. There isn't any high-low, there's nothing. I'm standing here as an officer of the Court telling you that. Now, if he's got some evidence that they paid me some money, I'd like to know. My accountant would be enthused to hear that.

THE COURT: All right. 4536.

MR. MOTLEY: Your Honor, this is a document that at this time is offered only against Philip Morris. I can go through all

the people here who are, Dr. Wakeham, the

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name of the recipient, Your Honor, was the vice president of Philip Morris. It's more than 30 years old, therefore it's not hearsay and it does make reference to benzo(a)pyrene. BAP.

THE COURT: All right. Philip Morris wish to be heard?

MR. OHLEMEYER: Yes, they do, Your Honor. Again, the mere fact that it comes out of the file of a company doesn't establish its evidentiary foundation or its relevance. There's no foundation to establish whether this was accurate, whether it was inaccurate, whether it was agreed, whether it was adopted by the company, whether it was acted by the company. All it is is a statement of one person about somebody else's opinions, the opinion of one person about another's opinion, and at that point it is not yet relevant in this case.

THE COURT: All right. Objection is noted, overruled. 4536 will be admitted as to Philip Morris only.

(Plaintiffs' Exhibit(s) 4536 received

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in evidence.)

THE COURT: 3949, analysis. Offered against whom, Mr. Motley?

MR. MOTLEY: Philip Morris at this time.

THE COURT: And briefly what is this and how is it relevant?

MR. MOTLEY: This is a document discussing nitrosamines in mainstream and sidestream smoke. It's a proposed paper. It goes on page 2, Your Honor, and it talks about the knowledge the corporation had that they had volatile nitrosamines in smoke.

Then on page -- excuse me one second, Your Honor. I see something here that I want to make sure I know exactly what it is before I say something. Judge, Your Honor, you'll note that Bates No. 28204, some handwritten notes, these Bates numbers, Your Honor, are the Bates numbers of the defendant, Philip Morris. Just so you know, this is how they produced them from their file, Your Honor. They paginated them; we didn't. We seek to move the entire document into evidence.

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THE COURT: Now, are you telling me this is a paper that was presented or proposed to be presented or --

MR. MOTLEY: It says to be presented at the symposium, "Risk Assessment of N-Nitroso Compounds for Human Health," Heidelberg, Germany, May 21 through the 23rd. You see at the top, Your Honor, the name of Dr. Osdene. You'll recall that's the gentleman we sought to ask questions about; he took the Fifth Amendment.

THE COURT: This is only offered as

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to Philip Morris?
MR. MOTLEY: Philip Morris at this time, yes, sir.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: Your Honor, there's no foundation to establish the relevance of this document. Its probative value is outweighed by its prejudicial effect. There's handwriting on this. It's a draft. Nobody is going to tell the jury whether it was actually presented, whether anybody agreed with it, whether it's accurate, whether it's good science, whether it's bad

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science. These are all the types of facts that are necessary to establish a foundation for its relevance. Otherwise, all it does is confuse and mislead the jury, and I think you could exclude it under Rule 403 if you didn't; or if you found there was a sufficient evidentiary foundation, you could still exclude it under Rule 403.
MR. MOTLEY: A statement of a party opponent, Your Honor, is -- I don't know where he gets all this foundational business from. It's produced from their files, from their business records. It's a statement of an employee in the course and conduct of his employment. Then it's admissible, period. It's not hearsay, and it doesn't need any other foundation.
THE COURT: 3949 will be admitted as to Philip Morris without the handwritten items on the first page, so clean that up if you would, Mr. Motley.
(Plaintiffs' Exhibit(s) 3949 received in evidence.)
MR. MOTLEY: Yes, Your Honor.
MR. OHLEMEYER: Your Honor, so the

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record is clear, the basis of my objection, it is my position that the fact that something is admissible as an admission over a hearsay objection doesn't make it in and of itself relevant or does not satisfy the plaintiffs' evidentiary foundation. You still have to have a document that's relevant, it still has to be probative. Then you decide whether or if it's hearsay.
MR. MOTLEY: It's about nitrosamines, Your Honor, which you already heard a lot about.
THE COURT: All right. Plaintiffs' 1409.
MR. MOTLEY: Your Honor, 1409 is sought to be admitted against all the members of the Tobacco Institute. This is a Tobacco Institute document produced by the Tobacco Institute. Mr. Panzer is an officer, Mr. Kornegay was the president of the Tobacco Institute. The relevance of this is that this demonstrates what their strategy and the conspiracy was, which we're

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alleging in this case, as you know. And you'll see the strategy was brilliantly

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conceived and executed over the years helping us win important battles. It has always been a holding strategy, consisting of creating doubt about the health charge without actually denying it. And then they go on about how they've used it, Your Honor.

MR. MOTLEY: This is the essence of their strategy that began in 1954, in the Muncie newspaper with the Frank Statement, which we say is a frank lie.

THE COURT: Mr. Ohlemeyer.

MR. OHLEMEYER: Your Honor --

MR. MOTLEY: Also, if I might, I'm sorry, Bill, there's one other piece of relevance, since they raised this common knowledge business, you know, they claim that common knowledge is a defense. If you look at pagination number 21101, it goes to the issue of common knowledge.

MR. OHLEMEYER: It's not on anybody's letterhead, Your Honor. It talks about a proposal. We don't know who Mr. Panzer is and whether Mr. Kornegay agrees with him, disagrees with him, thinks it's an accurate statement or inaccurate

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statement. Before any of this can have any probative value in this case, before it can do anything but confuse and mislead the jury, Mr. Motley needs to establish some foundation. It doesn't exist for this document.

THE COURT: How do we know who Mr. Panzer is?

MR. MOTLEY: Well, Mr. Panzer is the vice president of the Tobacco Institute, Your Honor. I'll be delighted to take a day off and go greet him with this document if you'd like, but the fact of the matter is they've admitted in answers to interrogatories, Horace Kornegay is a former Congressman from North Carolina who became the president of the Tobacco Institute.

This document was produced by the Tobacco Institute in the state of Florida case, in the state of Mississippi case, from their files. It was an admitted business record. Maybe counsel doesn't know that, but I can stand here and tell you they produced it from their files, and I'm telling you, Your Honor, as an officer of

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the Court, who Mr. Panzer and Mr. Kornegay are. It has copies here to the vice president on the back page, Mr. Kleopfer, Your Honor.

MR. OHLEMEYER: Very briefly, Your Honor, but what you don't know, and what I don't know, is what evidentiary foundation, if any, was required by these judges in

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these other cases Mr. Motley keeps citing to you and whether an appellate court would agree or disagree with that. The point is, in this case, on this record, there's an insufficient foundation for the admissibility of this document, and its probative value is far outweighed by its confusing and prejudicial effect.

MR. MOTLEY: I don't think you can make a 403 argument, Your Honor, unless you concede relevance, so obviously it's relevant. Its probative value can't be outweighed unless it's relevant. Again, Judge, it recites, it goes back, it says, we started this scam 50 or 20 years ago. That takes us back to 1952. It's part of the conspiracy. It's a statement against the

interest of the members of the Tobacco Institute.

Now, Your Honor, I don't know whether Liggett was a member of the Tobacco Institute in 1972. I'll have to let you know that in the morning. They were in and out. But I offer it right now against everybody, all the defendants, all the American defendants, Brown & Williamson, American Tobacco Company, Philip Morris, RJ Reynolds, Lorillard, and the Tobacco Institute. And I will find out overnight whether Liggett was a member at the time that this document was generated.

THE COURT: As with the other document, if there is evidence as to Mr. Panzer's employ, then I perhaps will order it admitted, but at this point I will not.

MR. OHLEMEYER: Your Honor, just so we're clear, I don't think there's a dispute about Mr. Panzer's employ. My objection is whether his opinion is shared by anyone, adopted by his employer, or communicated to any of the defendants in this case.

THE COURT: I misunderstood you, Counselor.

MR. OHLEMEYER: I'm sorry, because I don't want you to be misled. There's not much of a question about who Mr. Panzer is, which is why Mr. Motley or any lawyer preparing this case could have taken documents like this and gone out and established that foundation. They could have taken those depositions, they could have asked those questions.

MR. MOTLEY: Judge, we'd be trying this case in the year 2019 if I took the deposition of everybody who has written a culpatory document.

THE COURT: With that comment of Mr. Ohlemeyer, 1409 will be admitted then with that limiting instruction, as to whom it is offered against.

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(Plaintiffs' Exhibit(s) 1409 received in evidence.)

MR. SHOCKLEY: Your Honor, so that I understand, and maybe this will be clarified when they present the limiting instruction in the morning, is the offer

against those entities which were members of the Tobacco Institute in 1972?

THE COURT: That was the representation --

MR. SHOCKLEY: In 1972.

MR. MOTLEY: Correct.

THE COURT: Right.

MR. WAGNER: Judge, before we go to the next document, could I just interject a little something here, not specifically directed to any of these particular documents, but, you know, what's going on here is that we are having documents admitted without a sponsoring witness. And all we're looking at here are the documents and what is on the pages of these documents. Mr. Motley is testifying about matters that are not in this record; that they've been admitted in other cases, that they've come from this file or that file. And Your Honor, that's not part of the record in this case.

And in my experience, I mean, limited as it is, I've always found that to be improper. And I've been told by judges it's

highly improper to refer to things outside the record. And if Mr. Motley wants to be sworn and be a witness in this case, then he can be a witness, but he can't be an attorney. But it just seems to me that what we need to do is to judge the admissibility of these documents by looking at the documents and the face of the documents and see if, A, they are authenticated; B, they contain hearsay; C, if they pass the authenticity test, and all the other tests for admissibility on their face.

THE COURT: Thank you, Mr. Wagner. That is what I am attempting to do here. 270.

MR. MOTLEY: Your Honor, 270 is produced by Brown & Williamson. We offer it at this time against Brown & Williamson only. Your Honor, would you like for me to --

THE COURT: What's the purpose of it?

MR. MOTLEY: Yes, Your Honor. This is another doubt and controversy document. It says we can manufacture doubt and every

day of the week. Then it talks about the advertising code. Says our product, page 4, "Our product has doubt, our message has truth. Doubt is our product since it is the

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best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing the controversy, within the business we recognize a controversy exits."

Then it goes into matters about public knowledge, Your Honor. And Your Honor, on page 6, it lists its own cigarette products, and we're going to be reading interrogatories in, Your Honor, to link -- I don't think they deny that these are their products.

THE COURT: How do I know who prepared this?

MR. MOTLEY: Your Honor, it was produced by Brown & Williamson from their corporate files as a business record. This document, if you'll give me one second, Judge, let me see if I've got a way of -- if I have an indication in my notes here as to -- if they fessed up as to who wrote it.

1967

Judge, why don't we withhold that, let me see if I can answer your question directly in the morning. I'll call my Brown & Williamson expert.

THE COURT: 270, we'll withhold that.

21747.

MR. MOTLEY: Your Honor, this document was produced by British American Tobacco Company. It's the minutes of a meeting attended by Philip Morris. The Council for the Tobacco Institute, Covington and Berling, British American Tobacco Company, and companies that have relations, business relations, with other of the defendants in this case.

It's signed by Dr. Sharon Boyse, it has copies on the back to general counsel of BAT, it shows copies to the members of the Scientific Research Group of BAT. And I believe, Your Honor, one of these gentlemen is also a Big BAT employee, but I don't want to say that as an officer of the Court. I just see the name here; I recognize it; I'm pretty sure that he is, but at this point in

1968

time we offer it against BAT and Brown & Williamson.

THE COURT: Mr. Ohlemeyer.

MR. OHLEMEYER: Your Honor, this is a document, as Mr. Motley said, from the files of a non-party. Therefore, his hearsay exception admissions doesn't quite cover it. It is a summary of somebody's impressions of a meeting that he or she attended. It is replete with hearsay, and coming from the files of a non-party with no evidence that any of these opinions or hearsay statements were shared by, adopted by, or made by parties to this case. I think it should be excluded.

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MR. MOTLEY: Your Honor, it's 801(d), if it's nothing else. It's an 801(d)(2)(e) statement of one co-conspirator, whether indicted or unindicted, that's BATCO. Again, if we don't connect up the relationship between BATCO and BAT Industries, I'm sure Your Honor will remove this document just like you did the other documents.

THE COURT: Mr. Reynolds. I'm

sorry.

MR. MOTLEY: I apologize. I was only going to say, Your Honor, it demonstrates the cigarette company exported American lawyers to stir up controversy about environmental tobacco smoke on page -- I think it's on the first page, Judge. Yes.

MR. REYNOLDS: Your Honor, it is a British American Tobacco Company document that he's indicated he's introducing it against BAT. If by BAT he means British American Tobacco Company, you can't introduce it against them because they're not a party in the lawsuit, and I don't think there's any basis presently in the record to allow introducing it against BAT Industries.

MR. MOTLEY: Judge, this is just like the other two documents. It's conditional 104. We'll connect it up when we read interrogatories and the like in the case. But this is a document, Judge, which goes straight to environmental tobacco smoke issues and what they were trying to do, what their whole strategy has been all along

about the environmental tobacco smoke, which is to create a controversy, when none exists.

MR. REYNOLDS: The problem here is who makes up the "they", and I'm simply saying that one of the "they" that is not made up by this particular document on the record at this point is my client, BAT Industries.

MR. MOTLEY: BAT Industries owns and controls BATCO, Your Honor. That's what the proof is going to be in this case. We're going to prove that up; we're trying to prove up liability right now.

THE COURT: I understand that, Counselor, and Mr. Wagner's correct. Mr. Motley is not testifying here. I'm not basing it on his statements, but looking at the document, I don't see how it can be admitted against BAT Industries PLC. I will admit it as to Brown & Williamson only at this point with a limiting instruction.

(Plaintiffs' Exhibit(s) 21747 received in evidence.)

MR. MOTLEY: How many more of these

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do you want to do today, Judge?

THE COURT: Let's go through your list here. 9648.

MR. MOTLEY: 9648 is a Philip Morris, produced by Philip Morris, page -- the first page of the document, Your Honor, describes it is from Helmut Wakeham, vice president of R&D of Philip Morris, to the Chairman of the Board, Mr. Joseph Cullman, III, December 8, 1970. This is a document that goes to the heart of the conspiracy, Judge. Look at paragraph 2. "It has been stated that the Council For Tobacco Research is a program to find out the truth about smoking and health. What is truth to one is false to another. CTR and the industry have publicly and frequently denied what others find is true. Let's face it, we are interested in evidence which we believe denies the allegation that cigarette smoking causes disease."

Your Honor, it's very relevant. It goes into the type of research that's being funded by Philip Morris and the other defendants. I only seek to admit it at this

1972

time against the defendant, Philip Morris. If you look on the last page, Your Honor, you'll see the various recipients are senior officials, the Chairman of the Board of Philip Morris, Dr. Osdene, who took the Fifth Amendment when I tried to ask him about this document.

Mr. Bowling was vice president for public relations, Mr. Holtzman was general counsel and vice president, Mr. Goldsmith and Mr. Millhiser were senior executives.

THE COURT: Only offered as to Philip Morris. Any comment from Philip Morris?

MR. OHLEMEYER: Your Honor, first paragraph ends with the statement, "I offer the following summary, hastily adding that these statements embody ideas from many places."

That doesn't go to weight. This is hearsay. There is -- this is hearsay within hearsay. There are quotations all over here. No one is going to testify who made those statements. No one is going to testify whether Mr. Cullman or the rest of

1973

the company agreed with any of the statements.

It's nothing more than the statements of one person who may or may not have been -- regardless of what his title was, he is repeating what others have said. And the evidentiary foundation that makes any of this probative is what the company did with any of this, not what was written, not the words that appear on a piece of paper that can be found in a file.

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MR. MOTLEY: Judge, that goes to weight. That's nothing but weight. I might be uncharitable to say a make weight argument, but whatever form of weight it is, it is solely dealing with weight. He doesn't put any quotations marks, the vice president of the company doesn't put any quotations marks about this. He says, let's face it, we're interested in evidence which we believe denies the allegation that cigarette smoking causes disease. Theirs no quotes around that.

MR. OHLEMEYER: But, Your Honor, Mr. Motley could find a foundation for this.

He could look for a foundation for this. He could present a foundation for this. What he wants to do is to have you conditionally admit these things, show them to the jury, prejudice the jury, and then he doesn't really much care if he connects it up or if you strike this because at that point the jury has seen it.

So the point of all this is, there should be some order here. There is a chicken and an egg, and the chicken ought to come first and then we'll get to the eggs, but at this point there's no foundation for admissibility of this stuff.

THE COURT: Objection is noted and overruled. 9648 will be admitted as to Philip Morris only.

(Plaintiffs' Exhibit(s) 9648 received in evidence.)

THE COURT: 10791.

MR. MOTLEY: Your Honor, this is a document that is introduced against at this time Lorillard only. This is the handwritten notes of Mr. Curtis Judge, president of -- later became president of

Lorillard. The document goes to the, again to the heart of the conspiracy, Your Honor. Mr. Judge, in fact, has authenticated these as his handwritten notes. This was produced by Lorillard from their corporate files and the document says, "We have abdicated scientific research, discretional, directional management of the industry to the lawyers, with virtually no involvement on the part of the scientific or business management side of the business."

Then they go into -- this is not the first time this happened -- this is just like it happened back in the '60s, when the lawyers ran everything. There's a court in Minnesota, I believe I handed you, Your Honor, one of these orders in one of our many legal arguments, the Court in Minnesota found this document particularly damning because it goes to the -- the Court found and held, Your Honor, that the defendants created the CTR as a shield or a front to,

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and then let the lawyers run it and tried to hide some of the research results behind lawyer-client privilege, which you're going

1976

to be hearing a lot of as this trial goes on.

MR. OHLEMEYER: Exactly, Your Honor. I'd like to hear it. I'd like to hear it from a witness who could be cross-examined. I'd like to hear it from somebody under oath. I'd like to have a chance to produce evidence to the Court that contradicts some of this evidence you keep hearing from Mr. Motley.

There's no foundation to establish the relevance of any of this. We don't know whether these are Mr. Judge's words or the words of others. We don't know whether he agrees with them. We don't know if they're statements that are being made and recorded. We know when it was written, but we don't know why or how or when. All of that is evidentiary foundation that's necessary to make it relevant to a case where the plaintiffs' claim is a woman died as a proximate cause of exposure to environmental tobacco smoke in a hospital.

So I think there's a lack of foundation for its admissibility, and I think its

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probative value is outweighed by its confusing, time consuming, and prejudicial effect.

MR. MOTLEY: Your Honor, 801(d)(2) documents stand alone if they're relevant, Your Honor. If they come from their files and they've been authenticated, then they're an admission against interest. They stand alone; they need nothing else.

THE COURT: This is just offered to Lorillard, be admitted to Lorillard only.

MR. MOTLEY: Yes, Your Honor.

THE COURT: 10788.

MR. MOTLEY: Your Honor, this is a document produced by Philip Morris, from their files, offered solely against Philip Morris. It goes to document destruction. Or spoliation. We're going to be seeking a spoliation charge later in the trial. Judge, which one -- I'm sorry, I'm on 10791. Did you not get a copy of that?

THE COURT: I'm on 10788.

MR. MOTLEY: No, sir. 10791. Let me -- we must have forgotten to give you a copy. May I approach?

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THE COURT: Yes. Thank you. All right. 9648 was offered as to Philip Morris.

MR. MOTLEY: Which one, Your Honor?

THE COURT: 9648.

MR. MOTLEY: Yes, Your Honor.

THE COURT: Offered only as to

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Philip Morris.
MR. MOTLEY: Yes, Your Honor. So is this one. Again, I'm saying that at this time, Your Honor, at a certain point in time we're going to move to introduce all of these as statements of co-conspirators but not right now.
THE COURT: 10791, you indicated was offered only as to Lorillard.
MR. MOTLEY: No, Your Honor. 10791 is Philip Morris. The prior document was Lorillard. The handwritten notes was 19671. The numbers are getting a little confusing, I think. Judge, let me see if you've got -- this is the one you just asked me about, against Lorillard. Yes, that's the one you admitted against Lorillard.
THE COURT: I haven't held this

yet. That's why I want to be clear.
MR. MOTLEY: No, not that one. We haven't gotten to that one yet.
THE COURT: I know. I'm sorry. 10791, I'll hold it up here, is one paragraph.
MR. MOTLEY: That's correct.
THE COURT: You indicated was offered only as to Lorillard.
MR. MOTLEY: If I said that, I misspoke.
THE COURT: I may have misheard you. It's offered only as to Philip Morris?
MR. MOTLEY: Your Honor, you'll see Dr. Osdene's name there again, and Dr. Dunn was a senior researcher. His initials appear on it. Carolyn Levy is a senior researcher for Philip Morris. That's who it's referring to.
THE COURT: It's offered only as to Philip Morris, be admitted only as to Philip Morris.
(Plaintiffs' Exhibit(s) 10791 received in evidence.)
MR. OHLEMEYER: Over my objection,

Your Honor?
THE COURT: Over the objection.
MR. MOTLEY: 10788 was the one you just asked me about. 10788 are the handwritten notes of Thomas Osdene. It's offered solely against Philip Morris. This is another document destruction piece of evidence. Says, "Send the stuff to my house and I'll act upon it and destroy it."
Again, this is another document we asked Dr. Osdene about, he took the Fifth Amendment.
MR. OHLEMEYER: Your Honor, if you believe everything Mr. Motley told you, you've heard that a witness invoked a constitutional right, that he's allowed to invoke, and you've learned that there is a document here that talks about shipping

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something, that deals with nothing we know about in this lawsuit, to somebody's house. There can't be any connection between this document, and this lawsuit at this point in the case. I object to it for lack of foundation, and under Rule 403 its probative value is far outweighed by its prejudicial,

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confusing and time-consuming effect.

MR. MOTLEY: It's not about somebody someplace. It's about Dr. Thomas Osdene, the senior researcher for Philip Morris, who was attached to the legal department. This is a document about Cologne -- this was about research that was created, excuse me, funded by a Philip Morris in Europe. And this is a note about -- that says, "Ship all documents to Cologne by, keep in Cologne, okay to phone and Telex. These will be destroyed."

MR. OHLEMEYER: But the point -- I'm sorry to interrupt.

MR. MOTLEY: No. 6, if letters have to be sent, "Please send them to my house, I will act on them and destroy. Advise Rilander (phonetic)." Then you see the word, Imbeefo (phonetic). Your Honor, testimony will be in this case, I'm not making a statement under 104, Imbeefo was a European research facility owned and operated by Philip Morris. Then its got some names of scientists listed there.

MR. OHLEMEYER: Those words all

1982

appear there, Your Honor. So what? What do they have to do with this case? Can Mr. Motley tell you that anything that got shipped to somebody's house didn't stay in the file? Can he tell you that things that got destroyed at home didn't get copied and sent all over the world to other people. At some point he needs a witness to establish some of this foundation.

MR. MOTLEY: I've tried to take their witnesses --

THE COURT: Let him finish.

MR. OHLEMEYER: You know, the fact that he couldn't get a witness to say or agree with everything he wants a witness to agree to doesn't provide an exception under the Rules of Evidence for him to just parade all this stuff into evidence.

MR. MOTLEY: I misspoke on one thing, on paragraph 6. I said confidential. It says, "If important letters have to be sent." This goes to the state of mind of the corporation, Your Honor.

THE COURT: I agree with Mr. Ohlemeyer. 10788 will not be admitted

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at this point.

21437.

MR. MOTLEY: This is offered

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against the Tobacco Institute, Your Honor. Only. Again, Mr. Kloepfer was the name I introduced to Your Honor earlier. Mr. Knopick was a senior official of the Tobacco Institute. It refers to -- it deals with the addictive nature of cigarettes.

THE COURT: This is only offered as to the Tobacco Institute, Inc.?

MR. MOTLEY: At this time, yes, Your Honor.

THE COURT: All right.

MR. OHLEMEYER: The objection on behalf of all defendants, Your Honor, is that the subject of addiction is not a subject at issue in this case. And it, again, is hearsay within hearsay referring to and repeating the remarks of third parties or non-parties. And it's not really dealing with the subject of addiction. It's dealing with the definition of addiction described by the National Institute of Drug Abuse.

MR. MOTLEY: Well, Your Honor, if nothing else, it goes to notice that these definitions are being discussed. And you've already overruled his objection about addiction, Your Honor.

MR. OHLEMEYER: One other more important thing, Your Honor, is it talks about warning labels and the National Institute of Drug Abuse, wanting the word "addictive" as to cigarette warning labels. The law is very clear that since 1969, the warnings that are on cigarette packages are written by Congress, and that no claim can be based upon a failure to include different or differently worded language in those warnings. So I think this deals with an issue of a fact that is not relevant to the lawsuit. It deals with a claim, a legal claim, that is preempted by the supremacy clause of the Constitution and the preemptive effect of the labeling act as interpreted by the Chipallone case, and it always repeats hearsay of others that are non-parties.

MR. MOTLEY: Your Honor, you've

already ruled on this matter of preemption. You ruled, in fact, it did not preempt additional warnings on packages of cigarettes themselves, and a big part of our complaint here is that these defendants knew that cigarette smoking was addictive and didn't tell anybody.

THE COURT: 21437 will be admitted as to the Tobacco Institute, Inc., only.

(Plaintiffs' Exhibit(s) 21437 received in evidence.)

MR. MOTLEY: Your Honor, the next one on my list is 24877.

THE COURT: Research Liaison

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Committee.
MR. MOTLEY: Yes, Your Honor. The Research Liaison Committee was a committee that interfaced with, among other things, the Council For Tobacco Research.
MR. SHOCKLEY: What was the number, please?
MR. MOTLEY: 24877. At this time, Your Honor, we simply offer it against the Council For Tobacco Research. It was produced -- actually, Your Honor, it was

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produced by Philip Morris, so we offer it against CTR and Philip Morris. Produced by Philip Morris from their files. The date of it is 1976. The relevance of it is obvious, Your Honor.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: It contains hearsay within hearsay, Your Honor. It is the summary of comments made in a meeting, and I don't think there's an evidentiary foundation that's been established to allow its admissibility in this case. Without knowing who said what and whether anyone agreed with it and how or why that connects to the issues to be decided in this case, I don't think you can establish its relevance. So all it does is confuse, mislead the jury and consume time.
MR. MOTLEY: I think it does a lot more than that, Judge, obviously, or I wouldn't be offering it.
THE COURT: 24877 will be admitted as to CTR and Philip Morris.
(Plaintiffs' Exhibit(s) 24877 received in evidence.)

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MR. MOTLEY: Your Honor, the next document we seek to admit solely against Brown & Williamson and if I believe I'm correct, this is the last document that we had given you for today. Your Honor, this is a document --
THE COURT: 284 for the record.
MR. MOTLEY: Yes, sir. This is a document which has been stipulated as authentic by Brown & Williamson. This is a memo from J. Kendrick Wells, III, to the vice president and general counsel, Mr. Ernest Pepples, regarding additives.
Your Honor, this is the first document you will see, it makes reference to the Committee of Counsel. The Committee of Counsel is an organization that was referred to in the Lorillard document that you admitted as making all management and directional decisions for the cigarette industry. We only seek to admit it at this time against Brown & Williamson, however, since it came from their files.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: Your Honor, this is

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a document that Brown & Williamson claims is privileged. It even contains the word "Privileged" on it. The only reason Mr. Motley has it is because a paralegal from a law firm employed by Brown & Williamson stole it and published it. Brown & Williamson has never voluntarily produced this document. They claim privilege, it is privileged and it should be -- the privilege should be maintained.

There's no evidentiary foundation to establish the relevance of the corporate counsel's thinkpiece on the additives issue to any issue in this case, and I think we avoid a lot of mischief and a lot of potential prejudice by excluding this kind of stuff unless there's some way to connect to the case or some way to overcome the claim of privilege, none of which has been established at this point.

THE COURT: What's the basis of the privilege claim?

MR. OHLEMEYER: It's from the corporate counsel to the president of the company giving him a thinkpiece. It's

opinion work product. It's a thinkpiece from the corporate counsel to the president of the company about a regulatory matter.

MR. MOTLEY: Your Honor, this document is in the public domain. It's been so ruled by six different courts, it's either in the public domain or its evidence of crime fraud. That's the reason why it hasn't been adjudicated to be privileged. This document discusses, Your Honor, on page 3 --

MR. OHLEMEYER: Your Honor, I object. I don't mean to interrupt, but I object to reading from a document --

THE COURT: I agree.

MR. MOTLEY: Judge, any person, you could go home, if you were so inclined tonight, Your Honor, you could turn on the Internet, you and 250 other million Americans can sit there in your living room and enjoy reading this document.

This document, Your Honor, was part of the basis of the Food and Drug Administration's finding that the cigarette companies had covered up from the government

for 17 years information that was important.

It was the basis, Your Honor, of a Congressional call for criminal investigation of the defendants in this case. In fact, such criminal investigation is going on right now. Three grand juries and, Your Honor, this case, this document is published in the Journal of the American Medical Association. It's in the Congressional record. It's on the Internet.

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The other judges, and I know this is not binding, but just so Your Honor will know, there's been findings that this document, that it would be a perversion of justice to allow every child in America and everybody in America to see this document but everybody has to decide the facts of this case; that is the jury, because everyone in America has got access to this document.

It's in the library at the University of California in San Francisco. As I said, it's on the Internet. It's in the public domain and, Your Honor, if you'd like us to brief that issue and not address this issue

with any witnesses tomorrow, I'll be glad to do that. Because there is a lot of law in Indiana on public domain, and I know Your Honor wanted to defer these privilege issues until trial and I think it probably would be helpful if we were able to present Your Honor with a discussion of why this document does not remain privileged once it's in the public domain. If I could have that, I won't try to put it in tonight, give Your Honor an opportunity to reflect on that because it does raise some interesting policy and legal questions.

THE COURT: Mr. Ohlemeyer.

MR. OHLEMEYER: Very briefly, Your Honor. We aren't here to decide law and policy. We're here to decide the case that's been brought by the Wiley family. Whether this is or isn't privileged doesn't make it more or less relevant. It's not relevant to the issues in this case.

THE COURT: You told me it was privileged.

MR. OHLEMEYER: It is privileged.

THE COURT: He says the privilege

has been waived.

MR. OHLEMEYER: I'm happy to brief that for you. Because it's never been voluntarily produced. Just because somebody steals something and puts it on the Internet, the rules of law, Rules of Civil Procedure, don't say that in and of itself makes it lose its privilege status.

THE COURT: I agree.

MR. OHLEMEYER: If it were that easy, all you'd have to have people do is run around and steal things. The point is, regardless of the privilege issue, it's not relevant.

MR. MOTLEY: I'll be happy to address relevance. The man is talking about destroying evidence on page 3. That's the relevance of it. It says if we run tests on these cigarettes --

MR. OHLEMEYER: Excuse me, Mr. Motley. I've asked politely.

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THE COURT: I don't want to read from the document at this point.
MR. MOTLEY: Your Honor, may I say this? In other words, we're going to brief

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this issue on the stolen issue, Your Honor. Your Honor granted our motion; that's the subject of an in limine ruling by you already granting our motion.
THE COURT: I understand that.
MR. MOTLEY: I'll give you a brief in the morning.
THE COURT: I'm going to take 284 under advisement until I see any comments you'd like to make in brief form, two or three pages, Counselor, on the privilege issue. I'll take it under advisement until tomorrow.
MR. MOTLEY: Yes, Your Honor.
THE COURT: Is that the extent of the documentary evidence, Counselor?
MR. MOTLEY: Give me one second, Your Honor.
THE COURT: At least for now?
MR. MOTLEY: Your Honor, have we clarified the difference, I think we have, between 10791 and 19671? You admitted both of them, but since they were both handwritten notes, I just want to make sure the record was clear that there are two

1994

separate documents. One of them is 19671, and the other is, what, 10791. The numbers are similar and they're both handwritten notes. And I will -- Your Honor, I didn't want to mislead you and say that's all the documents we're offering.
THE COURT: No, I understand. 10791 was admitted as to Philip Morris only.
MR. MOTLEY: And then 19671 against Lorillard only. And I think that's where the confusion came from, Your Honor. Both of them are handwritten notes. We addressed both of them in oral argument.
10791 is not a handwritten note. It's this right here. Judge, we discussed both of them. This is the one -- I think the record is clear, but she thought maybe there was some confusion.
THE COURT: I want to make sure it is. I have 10791 admitted as to Philip Morris. Now, what was the other one?
MR. MOTLEY: 19671. Have you admitted this one?
THE COURT: I need to deal with this one. This is 19671, under the date

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4/21/78, Scientific Research Liaison Committee, handwritten notes. Appear to be.
MR. OHLEMEYER: You admitted that, Judge, over our objections. These were the notes that were described by Mr. Motley as Curtis Judge's notes.

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THE COURT: Well, if I did, I'm going to deal with it again because I don't see it in my notes nor does -- do you see that?

19671, let's talk about it. Scientific Research Liaison Committee, you're offering it against whom, Counselor?

MR. MOTLEY: Your Honor, we did discuss this. This is the one with Curtis Judge. I indicated who it was. It was Lorillard. It talks about abdicating the research to the lawyers. Mr. Ohlemeyer and I both remember arguing this one.

THE COURT: All right.

MR. OHLEMEYER: So we can incorporate our arguments by reference.

THE COURT: You're offering it as to Lorillard only. I had that down here, and I have the wrong number on it. My

confusion. 19671, admitted as to Lorillard only.

(Plaintiffs' Exhibit(s) 19671 received in evidence.)

MR. MOTLEY: Thank you, Your Honor.

THE COURT: I think that clears up the documents for this evening. We talked about Friday -- and I know it's late but tomorrow what depositions do you intend to offer, Mr. Motley?

MR. MOTLEY: Your Honor, I have a fond hope that I will be able to get the Colby, Frank Colby deposition, in a form presentable to Your Honor to rule on the objections. Dr. Colby was the senior researcher of RJ Reynolds. And at this time we would offer it only against RJ Reynolds, the deposition.

The deposition was taken in the state of Minnesota litigation, cross-noticed in a class action in New York and cross-noticed in the state of Texas litigation and both, all -- we adopted the Minnesota direct. They adopted the Minnesota -- excuse me, we adopted the Minnesota cross. They, meaning

RJ Reynolds, adopted the Minnesota direct by Reynolds. And then I also did my own cross-examination.

We've designated my cross-examination a few pages from the Minnesota cross-examination, and they've designated the entire Minnesota direct examination. It's a videotape deposition. You may recall I mentioned to Your Honor that this was the deposition of the gentleman who was from Germany.

THE COURT: I recall that.

MR. MOTLEY: He has a very thick accent. What we attempted to do here is dub, what do you call it, subtitle it like an old silent movie from the transcript with the statements of the witness.

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THE COURT: I read Reynolds' objections this afternoon in my spare time. Let me ask you, Mr. Motley, do you intend to offer the entire deposition?

MR. MOTLEY: Your Honor, we designated my cross, which is about 45 minutes. The deposition is three days long. The answer to your question is no.

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THE COURT: Thank you.

MR. MOTLEY: The deposition is three days long. My cross was about 45 minutes. I think the Minnesota cross that we designated was, what, about 10 or 15 minutes because it puts them in a frame of reference who the man is and what his position was, and they designated about a 30-minute direct, so the whole deposition, if you admit the whole -- if the deposition is admitted as it is, it shouldn't be more than two hours.

THE COURT: You intend to do that tomorrow depending on the Court's ruling?

MR. MOTLEY: I really would like to do that tomorrow, yes, sir.

THE COURT: Tomorrow afternoon?

MR. MOTLEY: Yes, sir.

THE COURT: Who will you begin with tomorrow morning?

MR. MOTLEY: We have a lay witness tomorrow. Who is it? A Nurse Beardsley and then Dr. David Burns, former editor of various Surgeon General reports.

THE COURT: All right.

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MR. MOTLEY: And there will be a number of documents that you haven't ruled on that we'll have to deal with before we put Dr. Burns on unless we want to do it with him on the stand, which I'm quite prepared to do, whatever Your Honor wishes.

THE COURT: You indicated, or I asked you last Friday to tell us, besides the Colby deposition, what other depositions do you intend to offer this week? Can you tell me that at this point, in the next couple days?

MR. MOTLEY: Yes, Your Honor. You know we have the Fifth Amendment issue of Dr. Osdene. We have Dr. Gary Huber, which also -- we have made a motion in Texas to have the Court communicate to you like he did with the Mississippi court and the Florida court saying it was okay to use the deposition. In other words, the seal of the deposition only existed until such time it was, by looking at the order itself, only until such time as it was offered in evidence and then they overruled the objections of the defendants to offering it

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into evidence.

It was not to be released, Your Honor,

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to the press until it was offered, offered at trial. That's why the Court ruled that it could be used if the Court admitted it in Florida and admitted it in Mississippi. It could be used in those cases. Dr. Osdene's attorney has told us, Your Honor, that if we call him at any case, he would give me the same answers, that is, take the Fifth.

I believe that that is, with the exception of perhaps a few questions and answers from Mr. Steven Goldstone, the CEO of RJR Nabisco, and some 15 or 20 minutes from the deposition of Dr. Spears, CEO of Lorillard, the depositions I've mentioned, Colby, Huber, Osdene, Spears, and Goldstone are the only ones that we would offer this week. And that's ambitious, if we get to all them.

THE COURT: All right.

MR. OHLEMEYER: Can I ask a question, Your Honor?

THE COURT: Yes.

MR. OHLEMEYER: My ill temper is

explained in part because of the scheduling difficulties that everybody encounters in these cases. I just heard a lot that kind of surprised me. Do I need a witness? I mean, maybe it's not fair to ask Mr. Motley whether I need a witness Tuesday. But --

MR. MOTLEY: Oh, no, you don't need a witness Tuesday.

MR. OHLEMEYER: When does anybody think I need a witness? Because once we get into Wednesday, we're starting to push three weeks on the plaintiffs' case.

MR. MOTLEY: Judge, you know, this is, as you know, a very complicated case. The defendants would have us, you know, take these thousands of people's depositions. Thankfully, Your Honor hasn't made us do that. We're going as fast as we can possibly be going. Your Honor has really kept our nose to the grindstone. I think everyone can attest to that. I can't contemplate when we are going to rest. But we've got a lot of witnesses. We've got the three local doctors. They contest that their cigarettes were at the hospital; we've

got to prove that. We've got to prove the conspiracy. We've got admissions against interests of the various of the defendants. I'm winnowing down the number of experts. I won't be calling all the experts. I'm certainly not going to read all the depositions. As I've told you, we only want to put four or five in this week. We probably have excerpts at most from maybe ten depositions when all is said and done.

THE COURT: When do you think the local doctors will testify?

MR. MOTLEY: They tell me next

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week. Early next week.
THE COURT: Early next week?
MR. MOTLEY: Yes, Your Honor.
MR. RILEY: Tuesday, Your Honor. Tuesday or Wednesday.
THE COURT: Will the plaintiff go all next week, you think?
MR. RILEY: Yes, sir.
MR. OHLEMEYER: It's hard for me to imagine we're going to finish this case in four weeks.
THE COURT: Well --

MR. SHOCKLEY: Judge, just a housekeeping matter. An attorney spoke and interposed an objection on behalf of Liggett earlier this afternoon, young lady in the courtroom, I don't think she's identified herself on the record. She certainly didn't today, and I don't remember her having done so previously when the other attorneys for Liggett were here. I think it would be appropriate if she did so.
THE COURT: Identify yourself on the record.
MS. ESAKOFF: Yes. I'm sorry, Sharon Esakoff.
THE COURT: Why don't you approach the lectern.
MS. ESAKOFF: I'm sorry. My name is Sharon Esakoff. I'm with Kasowitz, Benson, Torres & Friedman in New York, and I'm here on behalf of Liggett.
THE COURT: You have an appearance in this case?
MS. ESAKOFF: Me personally?
THE COURT: You.
MS. ESAKOFF: An Indiana law firm

applied for pro hoc vici admission for me.
THE COURT: That was granted as to you?
MS. ESAKOFF: I believe so.
THE COURT: You believe so. Spell your last name for the record.
MS. ESAKOFF: E-S-A-K-O-F-F.
THE COURT: Who was the Indiana law firm?
MS. ESAKOFF: It's Mr. Riley. I don't have the paper with me, I don't remember the name exactly.
THE COURT: Mr. Riley?
MR. RILEY: Riley Bennett & Egloff, Your Honor, not me. Riley Bennett & Egloff was the name of the firm.
THE COURT: All right. Thank you.
MR. MOTLEY: Your Honor, one other matter, housekeeping matter. Your Honor ordered them to produce -- from my understanding, I wasn't here this morning, I apologize, couldn't take off because of the weather. Not being here, my understanding is you ordered the defendants to produce

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documents this morning, but I don't know --

my colleague tells me that they don't recall whether you gave them a date by which they should produce them.

THE COURT: You're talking about the subpoena, Counselor?

MR. MOTLEY: Yes, Your Honor. I don't believe we did talk about a time frame on the response to the subpoena.

Those documents have already been produced in one package in Minnesota, Your Honor, so it shouldn't be all that great of a burden to make a copy of what they've already produced.

MR. OHLEMEYER: Your Honor, I've not talked with anybody about that yet, but obviously my advice is going to be as quickly as possible. Or sooner. I mean, I assume that's what the Court wants me to do.

THE COURT: That would be my direction, Counselor. As soon as practicable. Not over 48 hours from today.

MR. OHLEMEYER: Fine. Thank you.

THE COURT: Anything else, Counselor?

MR. MOTLEY: No, Your Honor, I'm

sorry.

THE COURT: That's all right. All right. Have a good evening. Thank you.

(Proceedings were recessed at 6:15 p.m. to be continued February 18, 1998 at 8:30 a.m.)

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